Supreme Court, U.S.
FILED

DEC 20 2010

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No. 10-846

IN THE

Supreme Court of the United States

STRATEGIC HOUSING FINANCE CORPORATION OF TRAVIS COUNTY, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended courts of law to apply two jurisdictional requirements applicable to the filing of tax refund suits (namely, the requirement to file an administrative tax refund claim per 26 U.S.C. § 7422(a) and to abide by the suit filing timelines per 26 U.S.C. § 6532(a)) to non-taxpayers separate and apart from other provisions of the integrated tax refund scheme, including the jurisdictional requirement to file the administrative claim timely per 26 U.S.C. § 6511(a)?

RULE 29.6

Petitioner does not have any parent corporations, and no publicly held companies own 10% or more of the corporation's stock.

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OPINIONS BELOW

1. The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 608 F.3d 1317 (2010). The opinions of the U.S. Court of Federal Claims (App., *infra*, 31a-51a) are reported at 87 Fed. Cl. 183 (May 29, 2009) and (App., *infra*, 52a-147a) and at 86 Fed. Cl. 518 (2009).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2010. The court of appeals denied petitioner's petition for panel rehearing and petition for rehearing en banc on September 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

1. 28 U.S.C. § 2401(a) provides, in relevant part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. * * *

2. 26 U.S.C. § 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the

time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

3. 26 U.S.C. § 6532(a) provides, in relevant part:

> (a) Suits by Taxpayers for Refund. (1) General Rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates. * * *

4. 26 U.S.C. § 7422 provides, in relevant part:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. * * *

STATEMENT

This case concerns the treatment of non-taxpayers under Title 26, the Internal Revenue Code, and the breadth and meaning of the Court's holding in *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008).

1. As part of the requirements to maintain the tax-exempt status of tax-free municipal bonds, state and local governments remit a portion of their income legally earned through investment ("arbitraging") of bond proceeds to the United States pursuant to the provision of 26 U.S.C. § 148(f).

A failure to "rebate" the proper amount of legally-earned arbitrage income results in the tax-free bonds being treated as "arbitrage bonds." Congress does not grant tax-exempt status to arbitrage bonds. 26 U.S.C. § 103(a). Accordingly, if a state or local governmental issuer fails to remit the proper amount of its legally-earned arbitrage income to the United States, the United States will treat interest paid by state and local governments on their otherwise tax-free bonds as taxable income to the holders thereof.

The United States does not treat arbitrage income remittances by state and local governments to the Internal Revenue Service as remittances of a tax. *See Government Finance Officers Ass'n v. Baker*, 686 F. Supp. 901, 902 (N.D. Ga. 1988) (clarifying an earlier opinion describing arbitrage rebate as a tax on behalf of a request by the United States); *see also City of Galt v. United States*, 804 F. Supp. 1275, 1278 (E.D. Cal. 1992) (providing, based on the agreement of both the United States and the City of Galt, that "arbitrage rebate is not a tax."). Therefore, notwithstanding the Title 26 requirement to remit a portion of their arbitrage

income to the Internal Revenue Service, the United States treats state and local governments as non-taxpayers in the context of their tax free municipal bonds.

The treatment of state and local governments as non-taxpayers has the following effects: state and local governmental issuers are not guaranteed legally-enforceable taxpayer rights during Internal Revenue Service examinations of their compliance with the arbitrage rebate requirement; state and local governments do not receive tax overpayment interest on refunds of their arbitrage income; state and local governments are not granted access to a tax prepayment forum for adjudication of disputes over the amount of arbitrage income due; and the United States does not limit claims for the recovery of arbitrage income to the statutory periods of time applicable to the filing of an administrative tax claim. *See, e.g.*, Prop. Treas. Reg. § 1.148-3(i), 72 Fed. Reg. 54,606 (2007) (denying interest on refunds of arbitrage income rebated to United States); *see also* Rev. Proc. 2008-37, 2008-29 I.R.B. 1 (providing, without statutory support, a special set of rules limiting the time period during which a claim for the return of an arbitrage income remittance will be deemed timely filed by the Internal Revenue Service).

2. Appellant, Strategic Housing Finance Corporation of Travis County [hereinafter "Strategic"] is a public nonprofit corporation created pursuant to the laws of State of Texas for the purpose of offering homeownership opportunities to low-income families. Strategic is a state or local governmental authority, which is authorized under Title 26 and Texas law to issue tax-exempt bonds "on behalf of" Travis County. *See* App., *infra*, 6a. Being created and controlled by a

local government, Strategic's income is excludable from gross income per 26 U.S.C. § 115 ("Income of States, Municipalities, Etc."). *See* App., *infra*, 6a.

As part of an audit on Strategic's municipal bonds, the Internal Revenue Service issued a notice to Strategic accelerating the first due date for an arbitrage income remittance. *See* App., *infra*, 7a. The Internal Revenue Service further demanded an increase in the amount of arbitrage income to be rebated by threatening to tax the holders of Strategic's bonds on the income they earned from the bonds. *See* App., *infra*, 8a. The Internal Revenue agent failed to state an actual amount of arbitrage income owed and instead demanded a change in the method of calculation, which resulted in an increase in the amount due. *See* App., *infra*, 8a. Strategic was not given the opportunity to contest the agent's findings in a prepayment forum. *See* App., *infra*, 8a.

Strategic computed an amount it believed to be due under the agent's theory and remitted this amount to the Internal Revenue Service under protest. *See* App., *infra*, 8a.

3. In 2006, pursuant to 28 U.S.C. §§ 1346(a)(1), 1491(a)(1), Strategic filed an illegal exaction suit against the United States in the Court of Federal Claims under three contentions: to recover its remittance; to contest the findings the Internal Revenue Service ostensibly made to support its issuance of the demand notice; and to contest the constitutionality of the regulatory provision the Internal Revenue Service relied on to issue the notice. *See Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (holding that the Claims Court has subject matter jurisdiction over amounts "improperly paid, extracted, or taken from claimant in contravention of the Constitution, a statute

or a regulation."); *see also Clapp v. United States*, 117 F. Supp. 576, 580 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 834 (1954) (holding that suit may be maintained under the Tucker Act to recover an illegal exaction when "the Government has the citizen's money in its pocket."); *see also Pan American World Airways v. United States*, 122 F. Supp. 682, 683-84 (Ct. Cl. 1954) (holding that "the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction); *see also Aerolineas Argentinas, et. al. v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (holding that "the Tucker Act provides jurisdiction to recover the sums exacted illegally by the Service due to its misinterpretation or misapplication of statutes, regulations, or forms."); *see also* Treas. Reg. § 1.148-10(f) (providing for the return of arbitrage income remittances); *see also* App., *infra*, 8a.

In the alternative, Strategic asserted that the requirement to remit arbitrage income constitutes the imposition of a tax and that its protested remittance of an estimated amount in response to an Internal Revenue Service audit was a deposit of such tax and should therefore be immediately returned with interest per 26 U.S.C. § 6603 (providing for the payment of interest on certain deposits of taxes). *See* App., *infra*, 19a.

4. The United States filed both Rule 12(b)(6) and Rule 12(b)(1) motions to dismiss, arguing that Strategic failed to exhaust administrative remedies and to fulfill a jurisdictional requirement to file an administrative tax claim prior to filing suit, per 26 U.S.C. § 7422(a). *See* App., *infra*, 9a. In support of its motions under Rule 12(b)(1), the United States reversed its administrative position that the filing of this administrative tax claim was not necessary prior to filing suit for the return of

arbitrage income. *Compare* IRS Tech. Adv. Mem. 2004-46-021 (Nov. 12, 2004), *with* IRS Tech. Adv. Mem. 2007-50-018 (Oct. 25, 2007).

5. On February 27, 2009, the United States Court of Federal Claims entered judgment dismissing Strategic's suit for lack of subject matter jurisdiction. *See* App., *infra*, 31a. The court did not rule on the separate Rule 12(b)(6) motion. App., *infra*, 53a. On May 29, 2009, the Court of Federal Claims declined an opportunity to alter or amend its judgment prior to appeal. *See* App., *infra*, 48a.

6. On June 7, 2010, the United States Court of Appeals for the Federal Circuit affirmed the portion of the judgment of the Court of Federal Claims dismissing the suit filed by Strategic for lack of subject matter jurisdiction. *See* App., *infra*, 21a. In its holding, the court of appeals mistakenly analyzes *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), as standing for the proposition that two provisions of the integrated tax refund scheme, the 26 U.S.C. § 7422(a) administrative tax refund claim requirement and the 26 U.S.C. § 6532(a) timelines for filing a tax refund suit, apply to any suit brought by any non-taxpayer in any court for any nontax amount remitted to or collected by the Internal Revenue Service. *See* App., *infra*, 26a-27a. The court of appeals further determined that these two provisions apply separately to suits filed by non-taxpayers for the return of nontax remittances. As such, the court of appeals concluded that the jurisdictional timeline found in 26 U.S.C. § 6511(a) for filing a claim under 26 U.S.C. § 7422(a) was not applicable to suits filed by non-taxpayers. *See* App., *infra*, 27a.

On September 20, 2010, the court of appeals denied Strategic's petition for panel rehearing and

petition for rehearing en banc. *See* App., *infra*, 148a-149a.

REASONS FOR GRANTING THE PETITION

The decision by the court of appeals erroneously interprets language in *Clintwood Elkhorn* in a manner that results in the application of a statement of law exactly contrary to the Court's holding. In dismissing Strategic's suit for lack of jurisdiction, the court of appeals finds it necessary to split the jurisdictional requirement to file an administrative tax refund claim from the jurisdictional requirement to timely file such claim within the statutory time period plainly and, heretofore, unmistakably applicable to the filing of such claims. 26 U.S.C. §§ 6511(a) and 7422(a). As a result, the decision by the court of appeals directly conflicts with the Court's holdings in both *Clintwood Elkhorn* and *United States v. A. S. Kreider Co.*, 313 U.S. 443 (1941), which provide that the administrative tax refund claim must be filed within the time period established in 26 U.S.C. § 6511(a).

The court's application of the administrative tax refund claim requirement (26 U.S.C. § 7422(a)) to non-taxpayers also directly conflicts with seventy years of precedent from the claims court and courts of appeal, which have consistently distinguished taxpayers from non-taxpayers and, in doing so, have excluded suits instituted by non-taxpayers from the tax refund claim requirement. *See Kirkendall v. United States*, 31 F. Supp. 766 (Ct. Cl. 1940); *see also Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709 (9th Cir. 1957). The decision by the court of appeals fails to cite to or distinguish this long line of clear authority. As a result, the court imposes jurisdictional

requirements in a manner that significantly departs from their accepted and usual application. *See* App., *infra*, 20a-30a.

The illogical analysis of the court of appeals is evident by its failure to recognize that the jurisdictional scheme it concocted provides for an unlimited period of time for non-taxpayers to file suit against the United States.

The language in the court of appeals decision is not limited to the estimated 60,000 state and local governmental issuers of tax free bonds; instead, the decision also encompasses other non-taxpayers who fall within the ever-expanding collection actions assigned to the Internal Revenue Service under Title 26.[1]

The analysis applied by the court of appeals is fundamentally flawed. It is also unusual because it fails to take the standard first step in determining the legal treatment of a remitter and remittance: to define the type of remittance. *See e.g., Massachusetts v. United States*, 435 U.S. 444, 465-66 (1978) (distinguishing user fees from taxes prior to the application of the tax immunity doctrine). App., *infra*, 13a. The court of

[1] Congress has empowered the Internal Revenue Service to collect many types of remittances not relating to federal tax obligations. The Internal Revenue Service, for instance, collects and withholds: (1) taxes owed to states (26 U.S.C. § 6402(e)), (2) child support obligations (26 U.S.C. § 6402(c)), (3) welfare benefits alleged to be overpaid (26 U.S.C. § 6402(d)(3)), (4) contractual debts alleged to be owed to the United States (26 U.S.C. § 6402(d)) and (5) certain user or filing fees imposed by Title 26 and outside of Title 26 (*see, e.g.*, 26 U.S.C. § 170(f)(13) (filing fees regarding conservation easements); 26 U.S.C. § 6103(p)(2) (user fees for providing information relating to tax returns, for reproducing returns, for enrolled actuary program, and for enrolled agent program); 31 U.S.C. § 9701 and 26 C.F.R. Part 300 (user fees for offers in compromise); and 26 U.S.C. § 7528 (user fees for private rulings)).

we need not resolve whether an
appeals simply stated, "[" App., *infra*, 20a. As a result,
arbitrage rebate is a tax did not invalidate Internal
the court of appeals lations that treat arbitrage
Revenue Service reguontax amounts. Instead, the
rebate remittances as r a portion of the jurisdictional
court of appeals appliedngress for suits brought by
bar established by Corought by a party regarded by
taxpayers to bar a suit bon-taxpayer seeking the return
the United States as a n
of its non-tax remittances, it would be appropriate for

For these reasonhe judgment of the court of
this Court to vacate tor reconsideration of the need
appeals and to remand te as a tax or nontax amount
to define arbitrage rebne Strategic as a taxpayer or
and, ultimately, to defi ernative, the petition should be
non-taxpayer. In the alt for briefing and oral argument.
granted and the case set

I. THE COURT OF APPEALS' DECISION APPLIES THE WRONG LAW DUE TO ITS MISUNDERSTANDING OF THIS COURT'S HOLDING IN *CLINTWOOD ELKHORN*

The United Stiates' petition for review in
Clintwood Elkhorn asserts that a "detailed and
reticulated tax refund scheme . . . designates the fora
for adjudication, requres an administrative claim,
establishes intricate and inter-related limitation
periods, and authoriz es judicial relief, including
interest." Petition for A Writ of Certiorari at 13-14,
United States v. Clintwood Elkhorn Mining Co., 553
U.S. 1 (Sept. 7, 2007) (No. 07-308). The United States
further asserted that the Clintwood Elkhorn Mining
Company should not be "permitted to 'disaggregate' . . .
[this] remedial scheme that 'Congress plainly

envisioned as a package deal.'" *Id.* On this argument, the U.S. Supreme Court granted certiorari and ultimately held in favor of the United States, citing *A. S. Kreider*, finding that an integrated tax refund scheme applied to the bind taxpayers to one scheme for relief. *Clintwood Elkhorn*, 553 U.S. 6-7, 17-19; *accord Hinck v. United States*, 550 U.S. 501 (2007).

The court of appeals decision directly conflicts with this Court's holdings in *Clintwood Elkhorn*. Per the current wishes of the United States, the court of appeals carves out and applies just two provisions from the supposed "packaged deal," the 26 U.S.C. § 7422(a) requirement to file an administrative tax claim and the timing provisions included within 26 U.S.C. § 6532(a), as a jurisdictional threshold for any suit against the United States brought by a non-taxpayer to recover any nontax amount collected by the Internal Revenue Service. App., *infra*, 22a-27a.

The court of appeals recognizes that the statutory timing requirements found in 26 U.S.C. § 6511(a) will not apply to the filing of an illegal exaction suit by a non-taxpayer seeking the return of a nontax amount.[2] *See* App., *infra*, 26a-27a. The court of appeals accordingly found "§ 6511(a) only applies to claims to recover a tax, not claims to recover a penalty or other sum" and that there was no requirement to "superimpose the limits of § 6511(a) onto § 7422(a)." App., *infra*, 27a. The court of appeals therefore splits the requirement to file an administrative tax refund claim from the requirement to timely file the claim

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[2] The Internal Revenue Service permits state and local governments to file claims for the return of arbitrage income remittances throughout a period of time that could with some frequency exceed thirty years from the date of remittance. Rev. Proc. 2008-37, 2008-29 I.R.B. 1.

within the statutory time period directly applicable to the filing of such claims. 26 U.S.C. § 6511(a).

The application of the tax refund claim requirement and not the statutory period for filing such claim violates the specific holding of *A. S. Kreider*, as recently confirmed by this Court in *Clintwood Elkhorn*. "If such suits were allowed to be brought subject only to the 6-year limitations period in the Tucker Act, ... § 1113(a) [the tax claim requirement] would have 'no meaning whatever.'" *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 14 (2008); *see also United States v. Dalm*, 494 U.S. 596, 601 (1990) ("Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' §§ 1346(a)(1), 7422(a), may not be maintained in any court."); *see also Little People's School, Inc. v. United States*, 842 F2d 570 (1st Cir 1988) and *Wachovia Bank, N.A. v. United States*, 455 F3d 1261 (11th cir 2006) (harmonizing the scopes of 26 U.S.C. §§ 7422(a) and 6511(a) in the context of a taxpayer who has not filed a tax return); *see also Radioshack Corp. v. United States*, 566 F.3d 1358 (Fed. Cir. 2009).

The court of appeals relies on *Clintwood Elkhorn* to reach its conclusion that reach of the tax refund-claim requirement of 26 U.S.C. § 7422(a) is broader than the reach of the statutory time limits on filing such claim found in 26 U.S.C. § 6511(a). App., *infra*, 27a. The court of appeals reasoned that "[t]he Court [in *Clintwood Elkhorn*] held that the plain meaning of I.R.C. § 7422(a) demonstrated that Congress required a party seeking a tax refund for *any reason* to follow the same procedure—filing a refund

claim first with the IRS." (Italics in original, underline added). App., *infra*, 18a. It did not matter to the court of appeals that the party in this case was not being treated as a taxpayer by the United States. App., *infra*, 23a.

In *Clintwood Elkhorn* the "party" referred to by the court of appeals was being treated by the United States as a taxpayer. *See Clintwood Elkhorn*, 553 U.S. at 4-5. The Clintwood Elkhorn Mining Company paid an unconstitutional tax. *Clintwood Elkhorn*, 553 U.S. at 5-6. Before filing suit, the Clintwood Elkhorn Mining Company, consistent with its treatment as a taxpayer, received the benefit of the integrated tax refund scheme by requesting and receiving a refund of the amounts paid for the three-year period permitted to claim tax refunds. *Clintwood Elkhorn*, 553 U.S. at 6, 19. After receiving its refunds under the integrated tax refund scheme, the Clintwood Elkhorn Mining Company filed suit under the Export Clause in an attempt to extend the normal three-year statute of limitations on tax refunds to six years. *See Clintwood Elkhorn*, 553 U.S. at 6. This extension would have allowed the Clintwood Elkhorn Mining Company to obtain a refund of the amounts paid, plus interest, in the three earlier years. *See Clintwood Elkhorn*, 553 U.S. at 2; *see also* 26 U.S.C. § 6511(a).

This Court held that the sole avenue available for taxpayers seeking refunds of taxes, tax penalties, interest on taxes, or amounts "in the guise of a tax," is the integrated tax refund scheme embodied in the Code. *See Clintwood Elkhorn*, 553 U.S. at 4, 12, 21.

Unlike the Clintwood Elkhorn Mining Company, the integrated tax refund scheme is not offered as an option to non-taxpayers such as Strategic. *See* App., *infra*, 65a–66a. The court of appeals applies the wrong

law when it applies the holding of the Court in *Clintwood Elkhorn*, a case involving a taxpayer seeking the return of a tax remittance, to conclude that non-taxpayers seeking the return of non-tax remittances must file an administrative tax refund claim. The clear evidence of this error is the court's inability to apply the statute of limitations found in 26 U.S.C. § 6511(a) to the filing of such claim.

II. THE COURT OF APPEALS IGNORES ITS OWN PRECEDENTS AND PRECEDENTS FROM OTHER COURTS OF APPEALS, WHICH ARE DIRECTLY IN CONFLICT

Non-taxpayers have never been treated the same as taxpayers. Taxpayers are defined by statute. 26 U.S.C. § 7701(a)(14) (defining a "taxpayer" to mean "any person subject to any internal revenue tax."); *see also United States v. Williams*, 514 U.S. 527, 533 (1995). Congress has prescribed special rules for certain non-taxpayers impacted by the revenue laws. *See, e.g.*, 26 U.S.C. § 7426 ("Civil Actions by Persons Other Than Taxpayers").

The distinction between taxpayers and non-taxpayers is relevant. Non-taxpayers do not receive overpayment interest on the return of their remittances. 26 U.S.C. § 6611(a) (providing for statutory interest only on "any overpayment in respect of any internal revenue tax".). Non-taxpayers do not receive the benefit of taxpayer rights. *See, e.g.*, 26 U.S.C. § 7605 (providing taxpayers the protections against repeated examinations); 26 U.S.C. § 7433 (providing taxpayers protections against unauthorized collection actions); 26 U.S.C. §§ 6103 and 7431 (providing taxpayers protections against unauthorized

disclosure of return information); 26 U.S.C. § 7602 (providing taxpayers the right to advance notice of third-party contacts); and, 26 U.S.C. § 7811 (providing taxpayers assistance from the Taxpayer Advocate). And non-taxpayers are neither included within the tax deficiency process nor have access to prepayment forums to contest amounts prior to collections by the Internal Revenue Service. *See* 26 U.S.C. §§ 6211, 6213 (limiting U.S. Tax Court jurisdiction to disputes involving taxpayers).

By blurring the distinction between taxpayers and non-taxpayers, the decision by the court of appeals directly conflicts with seventy year's worth of decisions by appellate courts. These decisions have consistently distinguished taxpayers from non-taxpayers and have also specifically held that the administrative tax claim requirement does not apply as a jurisdictional bar for suits brought by non-taxpayers. *See Kirkendall v. United States*, 31 F. Supp. 766 (Ct. Cl. 1940); *see also Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709 (9th Cir. 1957).

In *Kirkendall*, the court of claims found that the tax refund-claim requirement does not apply to non-taxpayer parties who file suit to recover amounts collected by the United States under implied contract. *Kirkendall*, 31 F. Supp. at 770.

In *Chinese Chamber of Commerce of Phoenix*, the Ninth Circuit Court of Appeals, quoting *Long v. Rasmussen*, 281 F. 236, 238 (D. Mt. 1922), found that an action to recover moneys taken by the Internal Revenue Service but belonging to another was "not an action to recover a tax alleged to have been erroneously assessed or collected, [and, accordingly] the Collector could not subject the appellants to the necessity of filing a full claim for refund under section 3772 of the

Internal Revenue Code." *Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709, 712-13 (9th Cir. 1957).

In *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585, 591 (Ct. Cl. 1972), the Court of Claims denied interest on the refund of moneys collected by the Internal Revenue Service to a non-taxpayer who complied with the tax refund-claim requirement. The Court emphasized that the denied interest stemmed from Congress' well-defined and comprehensive administrative system for the recovery of overpaid taxes by taxpayers:

> "All *taxpayers* who have overpaid their taxes are within this system and must follow the appropriate procedures and regulations, including the timely filing of claims for refunds of overpayments of taxes, if they are to have the benefits of the system. On the other hand, persons *who are not taxpayers* are not within the system and can obtain no benefit by following the procedures prescribed for taxpayers, such as the filing of claims for refund . . . ."

Economy Plumbing, 470 F.2d at 589-90; *see also Bader v. U.S.*, 10 Cl. Ct. 78, 79 (1986) (discussing, in the context of penalties assessed on partnerships under 26 U.S.C. § 6698, the treatment of the partnership as the only taxpayer and the ability of only the taxpayer to institute suit to recover wrongfully assessed and collected tax penalties).

The court of appeals inexplicably fails to discuss or distinguish this line of authority.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH STATUTORY LANGUAGE AND CREATES CONFUSION OVER STATUTORY PERIODS

The court of appeals must ignore plain statutory language to reach its conclusion that the statutory periods in 26 U.S.C. § 6532(a) apply to non-taxpayers. The court of appeals rightly concludes that the requirement to file an administrative tax claim and the timelines established by 26 U.S.C § 6532(a) work together. App., *infra*, 26a. But to apply 26 U.S.C. § 6532(a), a provision entitled "Suits by Taxpayers for Refund," the court of appeals must ignore the plain statutory language that requires the notice of disallowance to be mailed "to the taxpayer". *See United States v. Williams*, 514 U.S. 527, 541, 543 (1995) (Rehnquist, W., dissenting) (stating the applicability of "[section] 6532(a) clearly [is] limited to the 'taxpayer.'").

The application of the suit-filing timelines of 26 U.S.C. § 6532(a) to non-taxpayers confuses the application of two completely different sets of statutory limitations governing the date a non-taxpayer suit must be filed. Taxpayers are required to file an administrative tax claim within three years of the date the return was filed or two years after payment, whichever is later. 26 U.S.C. § 6511(a); *see also United States v. Brockamp*, 519 U.S. 347 (1997) (denying equitable tolling to delay the date a claim is due past the date set forth in 26 U.S.C. § 6511(a)). Once a claim is filed, taxpayers may file suit throughout the period ending two years from the date of mailing of a notice of disallowance. 26 U.S.C. § 6532(a).

Non-taxpayers, on the other hand, have six years to file suit for refund from the date a cause of

action first accrues. 28 U.S.C. § 2401. The filing of an administrative tax claim does not toll this six-year statute of limitations. *See* Rev. Rul. 57-242, 1957-1 C.B. 452 (providing that an administrative tax refund claim filed pursuant to 26 U.S.C. § 7422(a) does not act as a stay against the general six-year claim statute); *see also Computervision Corp. v. United States*, 445 F.3d 1355 (Fed Cir. 2006) (filing a tax refund claim does not operate as a stay on the general six year statute of limitations).

Therefore, non-taxpayers are subject to a "general" six-year limitation beginning at the date the cause of action first accrues, per 28 U.S.C. § 2401. Taxpayers are, alternatively, subject to "specific" limitations under 26 U.S.C. §§ 6511(a) and 6532(a), which require a taxpayer to file a claim within a specific period of time, and then binds the taxpayer to a two-year window to file suit once the Internal Revenue Code sends a notice of claim disallowance to the taxpayer. The taxpayer may also not file suit before six months after filing its claim. 26 U.S.C. § 6532(a).

As evidence of the enormity of the court of appeals' error to follow existing precedent, the court of appeals' holding creates an unlimited period of time for non-taxpayers to institute suit after the date the nontax amount is collected by the Internal Revenue Service. By eliminating the requirement to file a timely claim pursuant to 26 U.S.C. § 6511(a), the court of appeals creates an indefinite period of time for non-taxpayers to file claims under 26 U.S.C. § 7422(a). And as the statutory period for filing suit under 26 U.S.C. § 6532(a) is stayed until the date the refund claim is disallowed, the court of appeals creates an unlimited period of time after the date the nontax amount is

collected by the Internal Revenue Service for non-taxpayers to file a claim and institute suit.

This unlimited period will undoubtedly be challenged by the United States. As illogical as it may seem, the United States has already staked out a position that both the general and specific limitation periods may be at play in a single set of facts. *See Finkelstein v. United States*, 943 F. Supp. 425 (D.N.J. 1996) (upholding arguments made by the United States that the general statute of limitations overrides the specific tax statute of limitations to bar an "untimely" suit brought by a taxpayer).

If allowed to stand, the court's confusing application of the specific statutes of limitations in 26 U.S.C. § 6532(a) to non-taxpayers will of course raise many questions, such as: Do the specific or general limitations periods, or both, apply? Do non-taxpayers have a shortened general period of limitations (six months less than the normal six year period) due to the need to wait six months after filing a claim before filing suit, per 26 U.S.C. § 6532(a)? Is a non-taxpayer suit timely when the two-year specific limitations period of 26 U.S.C. § 6532(a) is still open but the six-year general period of limitations has expired? Or is such a non-taxpayer suit timely if the general period of limitations is still open but more than two years has passed since the claim was denied? It is our understanding that the conflicting construction of the two limitation periods and the court's erroneous application of the tax-specific statute of limitations to a non-taxpayer suit are issues already being raised with respect to suits being readied by other non-taxpayers.

IV. THE COURT OF APPEALS DECISION IS AN ATTEMPT TO SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE LEGISLATURE

The court of appeals is trying to replace the role of the legislative branch. Congress is well aware of both the differences between taxpayers and non-taxpayers and the integrated tax refund scheme's scope of application. For instance, where Congress wanted to apply part or all of the integrated tax refund scheme to non-tax remittances, they have set out specific rules through clear legislative pronouncements. *See* 26 U.S.C. § 5000A(g) (treating the penalty for failure to have health insurance as an assessable tax penalty, subjecting it to the integrated tax refund scheme, and limiting the collection methods to be applied by the Internal Revenue Service); *see also* 26 U.S.C. § 7519(f) (providing that the "required payment" under 26 U.S.C. § 7519(f) should be assessed and collected in same manner as if it were a tax, but returned without overpayment interest); *see also Semmes, Bowen & Semmes v. United States*, 30 Fed. Cl. 134 (1993), *aff'd without opinion*, 34 F.3d 1080 (Fed. Cir. 1994) and IRS Chief Counsel Advice 200607019 (Dec. 23, 2005) (holding that the 26 U.S.C. § 7519 required payment is not a tax payment, but a deposit).

Where Congress wanted to establish an exception to the integrated tax refund scheme for certain types of tax remittances, they have carved out specific statutory exceptions. *See* 26 U.S.C. § 4462(f) (excluding the harbor maintenance tax payment from the usual tax collection and refund scheme) and *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998); *see also* 26 U.S.C. § 4132(b) (providing a specific statute

of limitations for vaccine tax claims and creating an exception for statutory interest on the return of an overpayment of vaccine tax); *see also* 26 U.S.C. § 4662(d) (creating an exception for the payment of statutory overpayment interest on the return of certain chemical taxes).

And when presented with the opportunity to create a specific scheme for a certain type of non-taxpayer, Congress reflected its understanding that non-taxpayers are excluded from the requirement to file a tax claim first. *See* 26 U.S.C. § 7426(f); *see also Gordon v. United States*, 649 F.2d 837, 840 (Ct. Cl. 1981) (citing *Phillips v. United States*, 346 F.2d 999, 1000 (2nd Cir. 1965); *First Nat'l Bank of Emlenton, Pa. v. United States*, 265 F.2d 297, 300 (3d Cir. 1959); *Chinese Chamber of Commerce*, 168 F.2d at 712; *Tomlinson v. Smith*, 128 F.2d 808, 811 (7th Cir. 1942); *Rothensies v. Ullman*, 110 F.2d 590, 592 (3rd Cir. 1940) (all to the effect that "[d]ecisional law . . . was unclear whether a claim for refund by a third party (although not technically a taxpayer) was necessary prior to suit.")).

Congress has not set out a statutory scheme within Title 26 for all non-taxpayers impacted by Internal Revenue Service collections. Nor has Congress established a specific refund scheme for state and local governmental issuers of tax-free municipal bonds. The court of appeals was wrong to fabricate such a scheme from two statutory provisions clearly designed for and limited to taxpayers.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration of the

need to define Strategic as a taxpayer or non-taxpayer prior to applying jurisdictional requirements applicable only to taxpayers. In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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2009-5078

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STRATEGIC HOUSING FINANCE CORPORATION OF TRAVIS COUNTY, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

June 7, 2010, Decided

Appeal from the United States Court of Federal Claims in 06-CV-741, Judge Margaret M. Sweeney.

COUNSEL: WILLIAM MARK SCOTT, Law Office of W. Mark Scott PLLC, of Washington, DC, argued for plaintiff-appellant.

BETHANY B. HAUSER, Trial Attorney, Appellate Sec-tion, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were JOHN A. DICICCO, Acting Assistant Attorney General, and RICHARD FARBER, Attorney.

Before GAJARSA, LINN, and MOORE, Circuit Judges.

GAJARSA, *Circuit Judge*.

The issue before this court is whether a bond issuer must first seek an administrative refund for an arbitrage rebate from the Internal Revenue Service ("IRS") before filing a suit for a refund in the U.S. Court of Federal Claims ("CFC"). Strategic Housing Finance Corp. of Travis County, Texas ("Strategic Housing"), appeals from the CFC's order dismissing Strategic Housing's suit against the United States to recover its arbitrage rebate. In its complaint before the CFC, Strategic Housing alleged, among other things, that the United States required it to remit the arbitrage rebate as an illegal exaction or taking. The CFC dismissed the suit for lack of jurisdiction under I.R.C. § 7422(a).[1] We affirm and hold that § 7422(a) prohibits a court from asserting jurisdiction to hear a bond issuer's claim to recover an arbitrage rebate when the issuer failed to first seek an administrative refund from the IRS. However, we vacate that portion of the CFC's judgment addressing whether I.R.C. § 148(f)(3) grants the Secretary of the Treasury (the "Secretary") unfettered discretion to accelerate an arbitrage rebate.

BACKGROUND

Because of the complexity of the subject matter in this proceeding, it is helpful for the reader to obtain a general understanding of arbitrage bonds and rebates.

I. Arbitrage Bonds & Rebates

In general, Congress exempts the interest a bondholder earns on a state or local government bond from his gross income for tax purposes. *See* I.R.C. § 103(a) (2006). However, Congress does not grant tax-exempt status to three types of state or local government

bonds, including arbitrage bonds as defined in I.R.C. § 148. *See id.* § 103(b)(2). Arbitrage is the practice of "simultaneous[ly] buying and selling . . . identical securities in different markets, with the hope of profiting from the price difference in those markets." *Black's Law Dictionary* 112 (8th ed. 2004). For a bond, "[i]nvestment earnings that exceed the yield on a bond issue are referred to as arbitrage." 1 Jacob Mertens, Jr., *The Law of Federal Income Taxation* § 8:22, at 8-86 (2007). Accordingly, an arbitrage bond is any bond from which the issuer uses part of the proceeds "to acquire higher-yielding investments or to replace funds which were so used." *Id.* For example, a state or local government might issue ten-year bonds with a 3.0% interest rate and invest the proceeds into ten-year federal government bonds with a 3.5% interest rate instead of using the proceeds from the sale of its bonds for the purpose for which the bonds were issued. *See, e.g.*, S. Rep. No. 91-552, at 219 (1969) ("Some State and local governments have misused their tax exemption privilege by engaging in arbitrage transactions in which the funds from the tax-exempt issues are employed to purchase higher yielding Federal or other obligations the interest on which is not taxed in their hands . . . .").

Congress has enacted legislation defining arbitrage bonds and granting the Secretary rulemaking authority to carry out its arbitrage laws. *See* I.R.C. § 148. Congress has defined arbitrage bonds as bonds that the issuer issues "reasonably expect[ing]" to use "any portion of the proceeds . . . directly or indirectly--(1) to acquire higher yielding investments, or (2) to replace funds which were used directly or indirectly to acquire higher yielding investments." *Id.* § 148(a) (alteration added).[2] Accordingly, a bond's arbitrage status depends

on the bond yield. To ensure the enforcement of the arbitrage laws, Congress has authorized the Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of" its arbitrage laws. *Id.* § 148(i).

Pursuant to this rulemaking authority, the Secretary has defined bond yield for variable interest rate bonds using a formula that depends in part on the fees a bond issuer pays for qualified guarantees. *See* Treas. Reg. § 1.148-4(c)(1) (2009) ("The yield for each computation period is the discount rate that, when used in computing the present value as of the first day of the computation period of all the payments of principal and interest and fees for qualified guarantees that are attributable to the computation period, produces an amount equal to the present value . . . of the bonds . . . .").[3] In general, a guarantee is another firm's promise to make payments for items such as the bond's principal and interest when the bond issuer fails to pay the bondholders. *See id.* § 1.148-4(f)(3). A guarantee is a "qualified guarantee" only if the fees that the bond issuer pays for the guarantee satisfy additional regulations. *See id.* § 1.148-4(f)(1). For example, the "[f]ees for a guarantee must not exceed a reasonable, arm's-length charge for the transfer of credit risk." *Id.* With a few exceptions, *see, e.g.*, I.R.C. § 148(c)(1), state or local government bonds that the Secretary determines meet Congress's definition of arbitrage bonds based on his yield calculations lose their tax-exempt status such that bondholders must pay taxes on interest earned on the bonds, *id.* § 103(b)(2).

Congress has, however, provided a means for state and local governments to restore tax-exempt status to its

bonds after using the proceeds to acquire higher yielding investments. A bond issuer can maintain the tax-exempt status of its bonds by remitting the profits it earned from arbitrage to the United States. *See id.* § 148(f)(2). This sum is known as an arbitrage rebate. To qualify as an arbitrage rebate, the bond issuer must remit 90% of its arbitrage profits at least once every five years. *Id.* § 148(f)(3); Treas. Reg. §§ 1.148-3(e)(1), 1.148-3(f)(1), 1.148-3(g). However, the bond issuer's last installment is due sixty days after the day on which the bond issuer redeems its last bond. I.R.C. § 148(f)(3).

This timetable for remitting arbitrage rebates contains an important exception--the installments are due as prescribed by statute "[e]xcept to the extent provided by the Secretary." *Id.* Pursuant to his rulemaking authority, the Secretary has issued regulations governing arbitrage restrictions on state and local government bonds. *See* Treas. Reg. §§ 1.148-0 to 1.148-11. For example, the Secretary has authorized the Commissioner of Internal Revenue (the "Commissioner") to "take specific actions that ensure that the purposes of section 148 are effectuated." *Strategic Hous. Fin. Corp. of Travis County v. United States*, 86 Fed. Cl. 518, 523 (2009). One of these rules authorizes the Commissioner to accelerate the date on which an arbitrage rebate is due:

> If the Commissioner determines that an issue is likely to fail to meet the requirements of § 1.148-3 and that a failure to serve a notice of demand for payment on the issuer will jeopardize the assessment or collection of tax on interest paid or to be paid on the issue, the date that the Commissioner serves notice on the issuer is

> treated as a required computation date for payment of rebate for that issue.

Treas. Reg. § 1.148-10(f).

The Secretary has also authorized the Commissioner to allow a state or local government to "recover an overpayment" of an arbitrage rebate when that government "establish[es] to the satisfaction of the Commissioner that the overpayment occurred." *Id.* § 1.148-3(i)(1) (alteration added). Both the regulations covering the accelerating authority and overpayment disputes are at issue in this case as explained below.

II. Strategic Housing's Arbitrage Bonds & Rebate

Strategic Housing is a nonprofit corporation organized to provide low-cost residential housing in Travis County, Texas. *Strategic Hous.*, 86 Fed. Cl. at 524. In September 2004, Strategic Housing issued a total of $ 35 million of "Variable Rate Lease Purchase Revenue Bonds" to finance a lease-to-own program in conjunction with the Federal Home Loan Mortgage Corp., commonly known as Freddie Mac. *Id.* at 524-25. Strategic Housing issued these bonds with a statement that purchasers could exclude the interest earned on the bonds from gross income for federal income tax purposes. *Id.* at 525. Although Strategic Housing's tax counsel advised that it could include this statement on the bonds, Strategic Housing did not obtain an advance IRS ruling that the bonds qualified as tax-exempt. *Id.*

After Strategic Housing began issuing the bonds, the IRS performed an audit. *Id.* Based on that audit, the IRS Office of Tax Exempt Bonds, Compliance and

Program Management ("TEB") "develop[ed] concerns about various arbitrage issues impacting the bonds." J.A. 60 (alteration added). In a letter dated May 31, 2006, a TEB examiner explained that Strategic Housing was paying a "Forward Purchaser Fee" to Societe Generale for not only a "transfer of credit risk," but also so that Societe Generale would "assume[] liability for any principal shortfall, at the bonds' maturity." *Id.* (alteration added). In other words, the "[f]ees for [the] guarantee . . . exceed[ed] a reasonable, arm's-length charge for the transfer of credit risk," Treas. Reg. § 1.148-4(f)(4)(i) (alterations added), because the fees paid for "services other than the transfer of credit risk," *id.* § 1.148-4(f)(4)(ii). The examiner explained that with this shortfall included as part of the service fee, the fee could not be a "qualified guarantee" under Treasury Regulation § 1.148-4(f). J.A. 60. Without the qualified guarantee, the Treasury Regulations required TEB to calculate a lower bond yield, thus increasing the arbitrage and jeopardizing the bonds' tax-exempt status. The examiner also listed several other arbitrage concerns and requested more information "in determining whether to issue a preliminary adverse determination." J.A. 61.

Instead of issuing a preliminary adverse determination, the IRS notified Strategic Housing on June 26, 2006, that the agency was accelerating the due date of a full arbitrage rebate pursuant to Treasury Regulation § 1.148-10(f) --the accelerating authority. *See Strategic Hous.*, 86 Fed. Cl. at 525. In the notice, TEB informed Strategic Housing that because it determined that the Societe Generale service fee was not a "qualified guarantee," it would adjust its calculation of the bond yield to exclude the fee. J.A. 62-63. Reducing the bond

yield created an arbitrage bond and "result[ed] in rebate due." J.A. 63 (alteration added). Moreover, TEB determined that without the demand of an accelerated payment, the rebate due on the bonds would be jeopardized. Accordingly, TEB required Strategic Housing to remit a rebate within sixty days of the June 26, 2006, rebate computation date, requiring the payment to be due on August 25, 2006. *See Strategic Hous.*, 86 Fed. Cl. at 525.

The jeopardy notice did not state an amount for the arbitrage rebate, and Strategic Housing hired an expert who calculated the rebate to be $ 267,444.00. *Id.* After obtaining a time extension, Strategic Housing remitted $ 267,444.00 to the United States on September 21, 2006, but "indicated on its enclosed IRS Form 8038-T that its 'remittance was specifically made under protest with all rights reserved.'" *Id.*

III. CFC Proceedings

On October 31, 2006, Strategic Housing filed suit against the United States in the CFC to recover its arbitrage rebate of $ 267,444.00. According to its first amended complaint, Strategic Housing alleged that the IRS "committed an illegal exaction and illegal taking without due process when it forced [Strategic Housing] to make an early remittance of a disputed amount under threat," J.A. 77 (alteration added), and that the IRS committed a separate illegal taking by refusing to pay interest on any refund of the rebate, J.A. 78. Strategic Housing further alleged that the IRS did not provide it with "a reasonable, timely opportunity to refute the IRS determinations [in the jeopardy notice] and, therefore, has no means to receive a timely refund

pursuant to existing IRS administrative procedures." J.A. 78 (alteration added). Finally, Strategic Housing claimed that its arbitrage rebate was "an immediately refundable deposit." J.A. 87. Strategic Housing filed its complaint with the CFC "without first filing a refund claim with the IRS" as required by Treasury Regulation § 1.148-3(i)(1). *Strategic Hous.*, 86 Fed. Cl. at 526.

On June 6, 2007, the United States filed a Rule 12(b)(6) motion to dismiss Strategic Housing's suit for failure to exhaust administrative remedies. *Id.* at 527. Subsequently, on October 26, 2007, the United States filed a Rule 12(b)(1) motion to dismiss for lack of jurisdiction based on I.R.C. § 7422(a), arguing that this statute required Strategic Housing to file an administrative claim for refund with the IRS before the CFC could assert jurisdiction. *See id.* at 528. Section 7422(a) states in its entirety as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

In its opposition to the Rule 12(b)(1) motion, Strategic Housing asserted for the first time that it had filed an administrative claim on Form 8038-R ("Request for

Recovery of Overpayments Under Arbitrage Rebate Provisions") on September 28, 2007, "to start the 6-month period under [26 U.S.C.] § 6532." *Strategic Hous.*, 86 Fed. Cl. at 526 n.18 (internal quotation marks omitted) (alteration in original). Strategic Housing further claimed to have "resubmitted" Form 8038-R to the IRS on December 12, 2007. *Id.*

The CFC granted the United States' Rule 12(b)(1) motion, holding that it lacked jurisdiction. *Id.* at 546. Based on the U.S. Supreme Court's decision in *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008), the CFC held that I.R.C. § 7422(a) requires state or local governments that seek a refund of its arbitrage rebate "to [first] seek an administrative refund prior to initiating suit in the Court of Federal Claims." *Strategic Hous.*, 86 Fed. Cl. at 526 (alteration added). Strategic Housing now appeals that decision.

This court has jurisdiction over Strategic Housing's timely filed appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

On appeal, Strategic Housing argues that the CFC improperly dismissed its suit to recover an arbitrage rebate for lack of jurisdiction under I.R.C. § 7422(a). According to Strategic Housing, it was not required to file an administrative refund claim with the IRS before filing a civil action to recover an arbitrage rebate in the CFC.

This court reviews the CFC's decisions regarding its jurisdiction without deference as a matter of law.

Keener v. United States, 551 F.3d 1358, 1361 (Fed. Cir. 2009). As the plaintiff, Strategic Housing bears the burden of establishing the CFC's jurisdiction. *Id.*

I. The Plain Language of I.R.C. § 7422(a)

When interpreting any statute, we look first to the statutory language. *Jimenez v. Quarterman*, 555 U.S. 113, 129 S. Ct. 681, 685, 172 L. Ed. 2d 475 (2009); Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). The best evidence of congressional intent is the plain meaning of the statutory language at the time Congress enacted the statute. *See, e.g., Ngiraingas v. Sanchez*, 495 U.S. 182, 187, 110 S. Ct. 1737, 109 L. Ed. 2d 163 (1990) ("We seek . . . indicia of congressional intent at the time the statute was enacted."); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). "[W]hen the statutory language is plain, we must enforce it according to its terms." *Jimenez*, 129 S. Ct. at 685; *see also Lamie*, 540 U.S. at 534; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000).

This case requires us to interpret statutes governing the CFC's jurisdiction over a claim against the United States to recover an arbitrage rebate. Under the Tucker Act, the United States has waived its sovereign immunity to suit when a plaintiff seeks to recover money that it paid to the United States in full or in part. *See Ontario Power Generation, Inc. v. United*

States, 369 F.3d 1298, 1301 (Fed. Cir. 2004). Specifically, Congress waived the government's immunity to a party's suit to recover sums that the United States illegally exacted under the Internal Revenue Code. A party who seeks to recover "[1] any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or [2] any penalty claimed to have been collected without authority or [3] any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws" may file a "civil action against the United States" in federal district court or in the CFC. 28 U.S.C. § 1346(a)(1) (alterations added).

However, a federal court's jurisdiction over illegal exaction claims is subject to the administrative refund scheme that Congress established in the Internal Revenue Code. *See Clintwood Elkhorn*, 553 U.S. at 4 ("The Internal Revenue Code specifies that before [bringing an action for a tax refund], the taxpayer must comply with the tax refund scheme established in the Code."); *United States v. Dalm*, 494 U.S. 596, 609-10, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990) (interpreting I.R.C. §§ 6511(a), 7422(a) to require a taxpayer seeking a refund of a gift tax to file a refund claim with the IRS before filing an action in federal court). Section 7422(a) of the code states that "[n]o suit . . . shall be maintained in any court for the recovery of [1] any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or [2] of any penalty claimed to have been collected without authority, or [3] of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund . . . has been duly filed with" the IRS. (Alterations added.) In other words, a party seeking to recover any internal-

revenue tax, penalty, or sum from the United States must pursue and exhaust its administrative remedies pursuant to the IRS's regulations prior to filing a complaint in federal court.

In this case, the plain language of § 7422(a) bars the CFC from asserting jurisdiction over Strategic Housing's claim for a refund of its arbitrage rebate. A claim to recover an arbitrage rebate clearly falls into either the statute's first category as a claim to recover an allegedly erroneous or illegal tax or into the third category as a claim to recover an allegedly excessive or wrongfully collected sum. Neither party argues that a claim to recover an arbitrage rebate would qualify as a claim to recover a penalty because a "'a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996) (quoting *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931)); *see also* I.R.C. § 148(f)(4)(C)(vii) (providing bond issuers the option to pay a penalty in lieu of an arbitrage rebate). Because the statute clearly covers a claim to recover an arbitrage rebate regardless of whether the rebate is defined as a tax or non-tax, we decline Strategic Housing's invitation to determine whether an arbitrage rebate is a tax in the first instance.

If an arbitrage rebate is a tax, a claim to recover an arbitrage rebate would be a claim to recover an "internal revenue tax alleged to have been erroneously or illegally assessed or collected." I.R.C. § 7422(a). This first category in the claim-for-refund statute has remained virtually unchanged since Congress enacted

it in 1866. *See* Act of July 13, 1866, ch. 184, § 19, 14 Stat. 98, 152 ("[N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . .") (codified as amended at Revised Statutes § 3226 (1878)). Likewise, the meanings of the terms "assess" and "collect" have not substantially changed since 1866. As in the 1860s, the term "assess" still means "[t]o set, fix, or charge a certain sum upon, as a tax." Noah Webster et al., *An American Dictionary of the English Language* 1324 (Springfield, Mass., G. & C. Merriam 1865); *see also* 1 *The Oxford English Dictionary* 709 (2d ed. 1989) (defining "assess" as "[t]o settle, determine, or fix the amount of (taxation, fine, etc.) to be paid by a person or community"); *Webster's New International Dictionary of the English Language* 139 (1925) (defining "assess" as "[t]o fix or determine the rate or amount of" or "[t]o apportion (a sum to be paid by a person, a community, or an estate), in the nature of a tax, fine, etc."). Moreover, in 1866, the term "collect" meant "[t]o gather into one body or place," and "collector" meant "[a]n officer appointed and commissioned to collect and receive customs, duties, taxes, or toll." Noah Webster et al., *An American Dictionary of the English Language* 251 (Springfield, Mass., G. & C. Merriam 1865). When Congress later reenacted and amended Revised Statutes § 3226, *see, e.g.*, Revenue Act of 1926, ch. 27, § 1113(a), 44 Stat. 9, 116, "collect" was more clearly defined in this context as "[t]o demand and obtain payment of, as an account, or other indebtedness; as, to *collect* taxes." *Webster's New International Dictionary of the English Language* 437 (1925); *see also* 3 *The Oxford English Dictionary* 709 (2d ed. 1989) (defining

"collect" as "[t]o gather (contributions of money, or money due, as taxes, etc.) from a number of people").

Again if an arbitrage rebate is a tax, the plain meanings of "assess" and "collect" show that Strategic Housing made a claim to recover an "internal revenue tax [that it] alleged to have been erroneously or illegally assessed or collected." I.R.C. § 7422(a) (alteration added). The IRS "collected" Strategic Housing's rebate when Strategic Housing "paid to the United States," *id.* § 148(f)(2), its arbitrage rebate and the IRS deposited the rebate into accounts holding the general federal revenues, Appellant's Br. 20. Based on its first amended complaint, Strategic Housing in effect alleged that the IRS "wrongfully collected" its arbitrage rebate because, among other things, the agency allegedly did so in violation of the Due Process Clause. To be sure, the IRS never assessed the arbitrage rebate by determining how much Strategic Housing would need to pay to retain its bonds' tax-exempt status. But the statutory language covers claims to recover a tax that the United States either "assessed *or* collected." I.R.C. § 7422(a) (emphasis added). Accordingly, § 7422(a) bars the CFC from asserting jurisdiction over a bond issuer's refund claim for an arbitrage rebate when one assumes that an arbitrage rebate is a tax and when the issuer has not first sought an administrative refund from the IRS.

Even if a claim to recover an arbitrage rebate is not a claim to recover a tax, the claim would fall squarely within the third category of § 7422(a). A word-by-word analysis demonstrates that a claim to recover an arbitrage rebate would be a claim to recover "any sum

alleged to have been excessive or in any manner wrongfully collected." I.R.C. § 7422(a).

First, if an arbitrage rebate is not a tax, then it would unquestionably be a sum as used in § 7422(a). In *Flora v. United States ("Flora II")*, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623, 1960-1 C.B. 660 (1960), the Supreme Court interpreted "any sum" in 28 U.S.C. § 1346(a)(1) to cover any "amounts which are neither taxes nor penalties" that a party seeks to recover from the United States. *Id.* at 149. The Court's definition of "any sum" also applies to § 7422(a). As the Court explained, Congress "copied" the language in 28 U.S.C. § 1346(a)(1) from Revised Statutes § 3226--the precursor statute to I.R.C. § 7422(a). *Flora v. United States ("Flora I")*, 357 U.S. 63, 65, 78 S. Ct. 1079, 2 L. Ed. 2d 1165, 1958-2 C.B. 895 (1958); *see also Flora II*, 362 U.S. at 152. Consequently, "the function of the phrase ['any sum' in 28 U.S.C. § 1346(a)(1)] is to permit suit for recovery of items which might not be designed as either 'taxes' or 'penalties' by Congress or the courts." *Flora II*, 362 U.S. at 149 (alteration added). In contrast, "the function of the phrase ['any sum' in § 7422(a)] is to [bar] suit for recovery of items which might not be designed as either 'taxes' or 'penalties' by Congress or the courts," if the party has not first filed the claim with the IRS. *Id.* (alterations added).

The Court's interpretation comports with how the term "sum" has been defined since Congress first included the phrase "any sum which it is alleged was excessive, or in any manner wrongfully collected" in 1872 into the claim-for-refund statute. Act of June 6, 1872, ch. 315, § 44, 17 Stat. 230, 257 (codified as amended at Revised Statutes § 3226 (1878)). The term "sum" has long meant

"[a] quantity of money or currency" or "any amount, indefinitely." Noah Webster et al., *An American Dictionary of the English Language* 1324 (Springfield, Mass., G. & C. Merriam 1865); *see also* 17 *The Oxford English Dictionary* 166 (2d ed. 1989) (defining "sum" as "[a] quantity or amount of money"); *Webster's New International Dictionary of the English Language* 2078 (1925) (defining sum as "[a] quantity of money or currency" or "any amount, indefinitely"). Moreover, it makes no difference that the sum came from an arbitrage rebate because "any" means *any*. As the Court recently explained, "Five 'any's' in one sentence and it begins to seem that Congress meant [I.R.C. § 7422(a)] to have expansive reach." *Clintwood Elkhorn*, 553 U.S. at 7 (alteration added).

Second, Strategic Housing alleged that this sum was collected in "excess." In its first amended complaint, Strategic Housing asserted that the IRS's exclusion of the Societe Generale service fee was error and that the correct calculation with the fee yielded a negative arbitrage of $ 229,060.43. *Strategic Hous.*, 86 Fed. Cl. at 525-26. Accordingly, Strategic Housing alleged that the arbitrage rebate was in excess of $ 496,504.43.

Third, Strategic Housing alleged that the IRS "wrongfully collected" the arbitrage rebate. As noted above, collect means "[t]o gather (contributions of money, or money due, as taxes, etc.) from a number of people." 3 *The Oxford English Dictionary* 709 (2d ed. 1989). The IRS "collected" Strategic Housing's arbitrage rebate because it informed Strategic Housing that "the *required* rebate payment must be *paid* no later than 60 days after the computation date" and it accepted Strategic Housing's payment by depositing

the sum into accounts holding general revenues. J.A. 62 (emphasis added).

A recent Supreme Court decision reinforces this conclusion. In *Clintwood Elkhorn*, the Court held that § 7422(a) barred coal companies from filing suit against the United States in the CFC for a refund of taxes that the United States levied on shipments of coal exports in violation of the Export Clause. 553 U.S. at 4. The Court explained that the CFC lacked jurisdiction because the coal companies failed to first seek an administrative refund from the IRS as required by § 7422(a). *Id.* Recognizing that the statute of limitations in the Internal Revenue Code had run, the coal companies filed suit in the CFC, asserting that the Tucker Act's more generous statute of limitations applied to their refund suit. *Id.* at 6. Under the Internal Revenue Code's statute of limitations, a taxpayer seeking a tax refund must file a claim within three years of filing a return or within two years of paying the tax, whichever is later. *See* I.R.C. § 6511(a). In contrast, the Tucker Act required a party to file a claim in the CFC "within six years after such claim first accrues." 28 U.S.C. § 2501. The Court held that the plain meaning of I.R.C. § 7422(a) demonstrated that Congress required a party seeking a tax refund for *any reason* to follow the same procedure--filing a refund claim first with the IRS. *Clintwood Elkhorn*, 553 U.S. at 4, 7-9.

The same is true of arbitrage rebates. The Court's expansive reading of § 7422(a) suggests that a claim for a refund of an arbitrage rebate is either a claim to recover an allegedly erroneous or illegal tax or a claim to recover an allegedly excessive or wrongfully collected sum. Such an expansive reading comports

with Congress's purpose in enacting § 7422(a). As the Court noted, Congress designed its refund scheme "'to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue,' to provide that refund claims are made promptly, and to allow the IRS to avoid unnecessary litigation by correcting conceded errors." *Clintwood Elkhorn*, 553 U.S. at 11-12 (quoting *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 51 S. Ct. 376, 75 L. Ed. 1025, 72 Ct. Cl. 734, 1931-1 C.B. 431 (1931)). As in *Clintwood Elkhorn*, conferring jurisdiction on the CFC over Strategic Housing's suit here would run counter to the refund scheme because jurisdiction would deprive the IRS of an opportunity to evaluate Strategic Housing's claim to recover its arbitrage rebate in the first instance.

II. Strategic Housing's Arguments

Strategic Housing raises several arguments on appeal, asserting that a plaintiff may file suit in the CFC to seek a refund of its arbitrage rebate without first seeking administrative relief from the IRS. As a threshold issue, Strategic Housing argues that this court must define an arbitrage rebate as either a tax or non-tax amount. If an arbitrage rebate is a tax, then Strategic Housing argues that I.R.C. § 7422(a) does not apply because Strategic Housing made a deposit on its rebate under protest, not a payment. Alternatively, Strategic Housing argues that if an arbitrage rebate is not a tax, then we should interpret § 7422(a) to bar only claims to recover a tax because the related statutes I.R.C. §§ 6511(a) and 6532(a) impose timing limitations on claims to recover taxes only, not other sums. We address these arguments in turn.

First, Strategic Housing argues that we must decide as a matter of first impression whether an arbitrage rebate is a tax or non-tax amount. Although federal district courts have addressed this issue in passing, no federal court has determined whether an arbitrage rebate is a tax or non-tax amount. *See Gov't Fin. Officers Ass'n v. United States*, 680 F. Supp. 1538, 1543 (N.D. Ga.) ("[T]he Arbitrage Tax is a direct tax on state and local governments."), *vacated by* 686 F. Supp. 901 (N.D. Ga. 1988); *City of Galt v. United States*, 804 F. Supp. 1275, 1278 (E.D. Cal. 1992) (stating in dicta that an "arbitrage payment is not itself a tax"). As Strategic Housing correctly notes, the Supreme Court has generally defined "'a tax [as] a pecuniary burden laid upon individuals or property for the purpose of supporting the government.'" *Reorganized CF & I Fabricators*, 518 U.S. at 224 (alteration added) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492, 27 S. Ct. 137, 51 L. Ed. 284 (1906)). An arbitrage rebate could be a tax on the basis that Congress requires tax-exempt bond issuers to remit the profits that the issuer earned from arbitrage to the United States, I.R.C. § 148(f)(2), by making payments to the U.S. Treasury as designated by the Commissioner, *id.* § 7809(a); Treas. Reg. § 1.148-3(g). According to Strategic Housing, bond issuers make arbitrage rebate payments into accounts that are part of the general federal revenues and thus available for public use.

However, we need not resolve whether an arbitrage rebate is a tax. As we explained above, I.R.C. § 7422(a) clearly covers a claim to recover an arbitrage rebate regardless of whether the rebate is defined as a tax or non-tax amount. For the purposes of this appeal, we merely recognize that an arbitrage rebate *might* be

considered a tax within the meaning of § 7422(a), but expressly reserve that question for another day.

Second, Strategic Housing argues that § 7422(a) does not apply if we consider an arbitrage rebate a tax because Strategic Housing made a *deposit*, not a tax payment. According to Strategic Housing, if an arbitrage rebate is a deposit instead of a tax payment, then the Supreme Court has held that the procedural prerequisites to filing a suit in the CFC, such as a statute of limitations or § 7422(a), do not apply. *See Rosenman v. United States*, 323 U.S. 658, 662-63, 65 S. Ct. 536, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945). Consequently, Strategic Housing argues that § 7422(a) does not apply to its arbitrage rebate because it remitted the amount as a deposit under protest, not a payment.

This court has indeed held that § 7422(a) does not apply to a deposit for a tax because a deposit is not a suit for "recovery of any internal revenue tax." *N.Y. Life Ins. Co. v. United States*, 118 F.3d 1553, 1558 (Fed. Cir. 1997). In *New York Life Insurance Co.*, this court explained that because the insurance company made the deposit "to cover 'a payment . . . of taxes expected to accrue *in the future*,' upon assessment," it could not be "a payment of taxes 'erroneously or illegally assessed, or collected.'" *Id.* (emphasis added) (quoting § 7422(a)). In short, we held that § 7422(a) does not bar a claim for a refund of a tax deposit.

But Strategic Housing misunderstands the nature of a deposit. An arbitrage rebate is simply not a deposit. According to the Supreme Court, deposits are placed into a separate account like "payments in escrow. They

are set aside . . . in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer." *Rosenman*, 323 U.S. at 662. A taxpayer makes a deposit on a future tax to "stop[] the running of penalties and interest." *Id.* (alteration added). In contrast, a state or local government does not deposit an arbitrage rebate into a separate account in anticipation of paying the full rebate when it becomes due. Instead, an arbitrage rebate is actually "*paid* to the United States" as required by the statutory timetable every five years or as made due by the Secretary. I.R.C. § 148(f)(3) (emphasis added). Even Strategic Housing concedes that arbitrage rebates are "not segregated into a special fund but deposited into the main coffers of the Federal government." Appellant's Br. 20.

Moreover, a deposit on an arbitrage rebate would be pointless. The only way for a state or local government to preserve the tax-exempt status of its bonds is to *pay* the rebate, *id.* § 148(f)(3), not place a deposit in an account should the IRS later determine the bonds are arbitrage bonds. In this case, Strategic Housing did exactly what the statute requires--it *paid* the arbitrage rebate to the United States.

Third, Strategic Housing argues that if an arbitrage rebate is not a tax, then we should interpret I.R.C. § 6532(a) as limiting the claims covered under § 7422(a) so as to cover only taxpayers or claims to recover a tax. According to Strategic Housing, § 6532(a) only applies to taxpayers, not non-taxpayers, because the statute says that the Secretary will mail a "notice of disallowance" "to the *taxpayer*." (Emphasis added.) Under § 6532(a)(1), a party filing a suit to recover "any

internal revenue tax, penalty, or other sum," pursuant to § 7422(a), cannot do so "before the expiration of 6 months from the date of filing the claim" with the IRS or "after the expiration of 2 years from the date of mailing . . . to the *taxpayer* of a notice of the disallowance." (Emphasis added.) If an arbitrage rebate is not a tax, Strategic Housing argues, then § 6532(a)'s timing requirements and § 7422(a)'s jurisdictional bar do not apply to bond issuers seeking to recover an arbitrage rebate.

Strategic Housing has the proverbial tail wagging the dog. The language in § 7422(a) defines the types of claims barred for failure to exhaust one's administrative remedies, not the timing limitations in § 6532(a). Section 6532(a) means what it says: the statute clearly applies to claims to recover any "tax, penalty, or other sum" when read together with § 7422(a). The first sentence in § 6532(a) explicitly refers to the three types of claims covered in § 7422(a). "No suit or proceeding under *section 7422(a)* for the recovery of *any internal revenue tax, penalty, or other sum,* shall be begun before . . . 6 months from the date of filing the claim . . . ." I.R.C. § 6532(a)(1) (emphasis added). We recognize that the term "taxpayer" ordinarily means one who pays a tax, not one who pays some other sum. But we do not read the term "taxpayer" as somehow redefining the three categories in § 7422(a). As explained above, the terms "tax," "penalty," and "sum" refer to three distinct claims. The Supreme Court has decided the issue, explaining that the phrase using the term "any sum" covers any "amounts which are neither taxes nor penalties" that a party seeks to recover from the United States. *Flora II*, 362 U.S. at 149; *cf. Clintwood Elkhorn*, 553 U.S. at 7 ("Five 'any's' in one sentence and it begins

to seem that Congress meant [I.R.C. § 7422(a)] to have expansive reach." (alteration added)). Thus, the timing limitations in § 6532(a) apply to a claim to recover not only any internal revenue tax, but claims to recover any non-tax amounts such as penalties or other sums.

In support of its construction of §§ 7422(a) and 6532(a), Strategic Housing invokes two canons of statutory construction: the *in pari materia* canon and the absurdity canon. But these canons do not support Strategic Housing's argument. As Strategic Housing notes, interpreting "any sum" in § 7422(a) differently from "other sum" in § 6532(a) would violate the *in pari materia* canon. Under this canon, courts should interpret statutes with similar language that generally address the same subject matter together, "'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S. Ct. 477, 34 L. Ed. 2d 446 (1972) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564, 11 L. Ed. 724 (1845)). While we certainly agree with Strategic Housing that we must interpret §§ 7422(a) and 6532(a) *in pari materia*, we disagree on how it applies in this case. Both of these sections apply to parties seeking to recover tax and non-tax amounts as long as the party's claim falls within the three categories of § 7422(a).

Section 7422(a)'s legislative history demonstrates that the *in pari materia* canon is particularly applicable here and that §§ 7422(a) and 6532(a) apply to the same types of claims. Although Congress has relocated the claim-for-refund statute several times over the past century and a half, the jurisdictional bar now found in § 7422(a) and the timing limitations now found in § 6532(a) were part of the same section until 1954. *See*,

e.g., 26 U.S.C. § 3772(a)(1)-(2) (1952); 26 U.S.C. § 1672(a)(1)-(2) (1934); 26 U.S.C. § 156 (1926); Revised Statutes § 3226 (1878). When Congress reorganized the Internal Revenue Code in 1954, however, it separated the jurisdictional bar and timing limitations into completely separate sections. *See* Internal Revenue Code of 1954, ch. 736, §§ 7422(a), 6532(a), 68A Stat. 3, 816, 876. Congress reorganized the code in large part "to place [provisions] in [a] more logical sequence, [to] delet[e] . . . obsolete material, and . . . to express the internal-revenue laws in a more understandable manner." H. Rep. No. 83-1337, pt. 1, at 1 (1954) (alterations added). Although Congress made substantive changes to some of the internal revenue provisions, it made no substantive changes to the jurisdictional bar or timing limitations now found in §§ 7422(a) and 6532(a), respectively. *See* H. Rep. No. 83-1337, pt. 34, at 99-109 (1954); S. Rep. No. 83-1622, pt. 36, at 133-49 (1954); *see generally* H. Rep. No. 83-2543 (1954) (Conf. Rep.). Aside from changing references from "the Commissioner" to "the Secretary or his delegate," Congress changed the first sentence of the timing limitation from "[n]o such suit or proceeding," 26 U.S.C. § 3772(a)(2) (1952), to "[n]o suit or proceeding under section 7422 (a) for the recovery of any internal revenue tax, penalty, or other sum," Internal Revenue Code of 1954, ch. 736, § 6532(a), 68A Stat. 3, 816. Because we must interpret those sections together and the plain meaning of § 7422(a) covers suits to recover both taxes and non-tax amounts, the timing limitations in § 6532(a) apply to parties seeking to recover non-tax amounts. Contrary to Strategic Housing's argument, § 6532(a) does not define the types of suits covered in § 7422(a). *Cf. United States v. Williams*, 514 U.S. 527, 534, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) ("[I.R.C. §

6511(a)'s] plain terms provide only a deadline for filing for administrative relief, not a limit on who may file [under § 7422(a)]." (alterations added)). It is the other way around.

The other canon on which Strategic Housing relies also does not help its cause. Strategic Housing argues that interpreting § 7422(a) to cover non-tax amounts would be absurd. According to Strategic Housing, if we interpreted § 7422(a) to bar suits to recover any tax, penalty, or other sum, but § 6532(a) to place timing limits on only suits to recover a tax, then a party seeking to recover a penalty or other sum could simply file its refund claim with the IRS and then file the same claim seconds later in federal court. We agree that such a construction of §§ 7422(a) and 6532(a) would be absurd. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989) (interpreting a statute so as to avoid an "odd result"); *id.* at 527 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result."). However, the logical incompatibility of these sections does not mean that we can ignore the plain language of the statute. The correct solution is to simply apply the plain language of § 7422(a).

Fourth, Strategic Housing argues that if an arbitrage rebate is not a tax, then we cannot interpret § 7422(a) to apply to a claim to recover an arbitrage rebate because the statute of limitations in § 6511(a) only applies to claims to recover a tax, not other sums. In support of its argument, Strategic Housing relies on *Clintwood Elkhorn and Radioshack Corp. v. United States*, 566 F.3d 1358 (Fed. Cir. 2009), to claim that §

6511(a) limits the types of claims to which § 7422(a) applies.

Strategic Housing misunderstands the limits of § 6511(a). That statute requires that a "[c]laim for credit or refund of an overpayment of *any tax* imposed by this title . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. I.R.C. § 6511(a) (emphasis added). On its face, § 6511(a) only applies to claims to recover a tax, not claims to recover a penalty or other sum. The plain language of § 7422(a) is broader than § 6511(a) as it covers three categories of claims, not one. To be sure, both the Supreme Court and this court have explained that " §§ 6511 and 7422 should be read together to bar a suit for refund in any court." *Radioshack*, 566 F.3d at 1362; *see also Clintwood Elkhorn*, 553 U.S. at 5 ("'Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund . . . may not be maintained in any court.'" (quoting *Dalm*, 494 U.S. at 602)). But neither court has held that we must superimpose the limits of § 6511(a) onto § 7422(a). Rather, we have interpreted §§ 7422(a) and 6511(a) together when the case involved a claim to recover a tax. *See Clintwood Elkhorn*, 553 U.S. at 4 (addressing how § 7422(a) applied to a claim to recover "taxes collected in violation of the Export Clause"); *Radioshack*, 566 F.3d at 1359 (addressing how § 7422(a) applied to a claim to recover payments under "the Federal Communications Excise Tax"). Therefore, all of Strategic Housing's arguments fail to support its position.

III. The CFC's Administrative Procedure Act Analysis

Finally, we must address the CFC's opinion on whether a federal court could review the Secretary's decision to accelerate an arbitrage rebate under I.R.C. § 148(f)(3). The U.S. Constitution limits a federal court's jurisdiction "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. If the Constitution, statute, or treaty does not confer jurisdiction on a federal court, it has no power to resolve the merits of the controversy before it. Consequently, a federal court should not render an opinion on the merits when it determines that it lacks jurisdiction over the matter: "Federal courts are not in the business of rendering advisory opinions." *C&H Nationwide, Inc. v. Norwest Bank Tex. NA*, 208 F.3d 490, 493 (5th Cir. 2000); *see also Alabama v. Shelton*, 535 U.S. 654, 676, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002) (Scalia, J., dissenting) ("[T]he Court has no business offering an advisory opinion . . . .").

In this case, the CFC rendered an advisory opinion on whether § 148(f)(3) grants the Secretary unfettered discretion to accelerate an arbitrage rebate and thus makes the Secretary's accelerating decision unreviewable under the Administrative Procedure Act ("APA"). *See Strategic Hous.*, 86 Fed. Cl. at 552-53. Before addressing the merits, the CFC noted that "it is well-settled that the Court of Federal Claims lacks jurisdiction to review an agency's decision under the APA." *Id.* at 552. It further noted, "[B]ecause the court cannot entertain actions based upon the APA, plaintiff cannot seek judicial review of the IRS's action on that

basis." *Id.* Notwithstanding its lack of jurisdiction, the court continued: "Even if plaintiff could invoke the APA, it does not apply where 'agency action is committed to agency discretion by law.'" *Id.* (quoting 5 U.S.C. § 701(a)(2)). The court then conducted an APA analysis. *See id.* at 552-53. The CFC should not have conducted an APA analysis after recognizing that it lacked jurisdiction. Consequently, we vacate that portion of the CFC's judgment addressing whether § 148(f)(3) grants the Secretary unfettered discretion to accelerate an arbitrage rebate.

CONCLUSION

For the foregoing reasons, we affirm and hold that I.R.C. § 7422(a) prohibits a court from asserting jurisdiction to hear a bond issuer's claim to recover an arbitrage rebate when the issuer failed to first seek an administrative refund from the IRS. However, we vacate that portion of the CFC's judgment addressing whether I.R.C. § 148(f)(3) grants the Secretary unfettered discretion to accelerate an arbitrage rebate.

AFFIRMED IN PART and VACATED IN PART
COSTS

Each party shall bear its own costs.

Footnotes

1All citations to the Internal Revenue Code ("I.R.C.") are references to Title 26 of the United States Code.

2The term 'higher yielding investments' means any investment property which produces a yield over the

term of the issue which is materially higher than the yield on the issue." I.R.C. § 148(b)(1).

3All citations to Treasury Regulations ("Treas. Reg.") are references to Title 26 of the Code of Federal Regulations.

No. 06-741 T
UNITED STATES COURT OF FEDERAL CLAIMS

STRATEGIC HOUSING FINANCE CORPORATION OF TRAVIS COUNTY, Plaintiff.

v.

THE UNITED STATES, Defendant.

May 29, 2009, Filed

OPINION AND ORDER

SWEENEY, Judge

Before the court is Plaintiff's Motion to Alter or Amend Judgment ("motion to amend"), filed pursuant to Rule 59(e) of the Rules of the United States Court of Federal Claims ("RCFC"). In its motion to amend, plaintiff Strategic Housing Finance Corporation of Travis County, an issuer of tax-exempt bonds, requests, among other things, that the court amend its February 27, 2009 decision dismissing plaintiff's amended complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), see *Strategic Hous. Fin. Corp. of Travis County v. United States*, 86 Fed. Cl. 518 (2009), to reflect that plaintiff's remittance of arbitrage rebate to the Internal Revenue Service ("IRS") under the provisions set forth in section 148(f) of the Internal Revenue Code ("IRC"), see 26 U.S.C. § 148(f) (2006), was a deposit, rather than a payment. In a March 10, 2009 order, the court requested that the government respond to plaintiff's motion to amend, see RCFC 59(b)(3), to which plaintiff was afforded an opportunity

to reply. Briefing concluded on April 21, 2009. For the reasons discussed below, plaintiff's motion to amend is denied.

I. STANDARD OF REVIEW

A motion to alter or amend judgment under RCFC 59(e) "seeks a revision which disturbs or revises legal rights and obligations that were settled by the previous judgment." *Maxus Energy Corp. & Subsidiaries v. United States*, 31 F.3d 1135, 1139 (Fed. Cir. 1994); see also *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) (noting that Rule 59(e) of the Federal Rules of Civil Procedure "had a clear and narrow aim," and was adopted "to 'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment" (alteration in original)). The United States Court of Federal Claims ("Court of Federal Claims") has previously applied the decisional law guiding a motion for reconsideration pursuant to RCFC 59(a) to an RCFC 59(e) motion to amend. See *Stockton E. Water Dist. v. United States*, 76 Fed. Cl. 470, 472 (2007) (discussing whether the plaintiff asserted one of three grounds that warrant reconsideration under RCFC 59: (1) an intervening change in controlling law; (2) the availability of evidence not previously available; or (3) the need to prevent manifest injustice). The United States Court of Appeals for the Federal Circuit has also utilized the standards set forth in Rule 59(a) to review Rule 59(e) motions. Compare *Parsons ex rel. Linmar Prop. Mgmt. Trust v. United States*, 174 Fed. App'x 561, 563 (Fed. Cir. 2006) (discussing the three grounds that warrant reconsideration under RCFC 59: (1) an

intervening change in controlling law; (2) the availability of evidence not previously available; or (3) the need to prevent manifest injustice), with *Ajinomoto Co. v. Archer-Daniels-Midland Co.*, 228 F.3d 1338, 1350 (Fed. Cir. 2000) (addressing a Rule 59(e) of the Federal Rules of Civil Procedure motion to amend judgment in a patent case and applying the law of the United States Court of Appeals for the Third Circuit, which instructed that a motion to amend judgment must rely on (1) an intervening change in controlling law, (2) the availability of evidence not previously available, or (3) the need to prevent manifest injustice). Accordingly, the court is guided by the standard for reviewing a motion for reconsideration pursuant to RCFC 59(a) in its consideration of plaintiff's motion to amend.

In Northern States Power Co. v. United States, the court stated that an evaluation of a motion for reconsideration is "guided by the general understanding 'that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved . . . .'" 79 Fed. Cl. 748, 749 (2007) (quoting *Withrow v. Williams*, 507 U.S. 680, 698, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)). Pursuant to RCFC 59(a), the court may grant reconsideration "to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." The "decision whether to grant reconsideration lies largely within the discretion of the district court," *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990), and courts must "consider motions for rehearing with exceptional care," *Carter v. United States*, 518 F.2d 1199, 1199, 207 Ct. Cl. 316 (Ct. Cl. 1975).

A motion for reconsideration "must be based 'upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court.'" *Prati v. United States*, 82 Fed. Cl. 373, 376 (2008) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999)). "Manifest" means "clearly apparent or obvious." *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002). The moving party "must support the motion by a showing of extraordinary circumstances which justify relief." *Fru-Con Constr. Corp.*, 44 Fed. Cl. at 300. "Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice." *Matthews v. United States*, 73 Fed. Cl. 524, 526 (2006) (citing *Griswold v. United States*, 61 Fed. Cl. 458, 460-61 (2004)). Therefore, a court "will *not* grant a motion for reconsideration if the movant 'merely reasserts . . . arguments previously made[,] . . . all of which were carefully considered by the Court.'" *Ammex, Inc.*, 52 Fed. Cl. at 557 (quoting *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993) (first & third alterations in original). A party "may not prevail on a motion for reconsideration 'by raising an issue for the first time on reconsideration when the issue was available to be litigated at the time the complaint was filed.'" *Six v. United States*, 80 Fed. Cl. 694, 697 (2008) (quoting *Matthews*, 73 Fed. Cl. at 525). Similarly, a motion for reconsideration "should not be based on evidence that was readily available at the time the motion was heard." *Seldovia Native Ass'n v. United States*, 36 Fed. Cl. 593, 594 (1996). Additionally, where a party seeks reconsideration on the ground of manifest injustice, "the moving party can only prevail if

it demonstrates that the injustice from the case is 'apparent to the point of being almost indisputable.'" *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed. Cl. 27, 31 (2007) (quoting *Pac. Gas & Elec. Co. v. United States*, 74 Fed. Cl. 779, 785 (2006)).

II. PLAINTIFF'S MOTION TO AMEND[1]

Plaintiff asserts that the court's February 27, 2009 decision contains "at least four clear errors of law which directly lead to . . . manifest injustice . . . ." Pl.'s Mot. Alter Amend J. ("Mot.") 1; see also *id.* at 13 ("[B]ecause plaintiff's proceeding would not have been dismissed if these errors of law had not been relied upon, plaintiff was subject to a manifest injustice when this proceeding was dismissed for want of jurisdiction."); Pl.'s Reply Resp. United States Pl.'s Mot. Alter Amend ("Reply") 1 (alleging that the court "fails to adhere to the facts pled by plaintiff, resulting in multiple clear errors and manifest injustice"). Plaintiff attributes these alleged errors to the court's "fail[ure] to recognize the discrepancies between the *Facts as Pled* and *Defendant's Asserted Position*." [2] Reply 2. Plaintiff argues that its remittance of "an estimated and disputed amount" of arbitrage rebate "was a deposit both under existing case authority and even IRS standards of practice," and maintains that "[b]ecause of the background of its counsel . . ., plaintiff believed in 2006 and still believes today[] that it preserved the tax-exempt status of its bonds by making a *deposit* of rebate with the U.S. Treasury." [3] Mot. 3. It requests that

> the Court's opinion should assume that the jeopardy notice demanded both an acceleration

> of the computation date and a specific modification to the assumptions used to determine the amount of plaintiff's arbitrage rebate remittance. The Court's opinion should further assume that the demand by the IRS to change these assumptions was based solely on an unproven IRS revenue agent's examination theory and that the 'amount demanded by the jeopardy notice consisted only of the directions regarding the use of certain assumptions. The Court's opinion should also assume that plaintiff remitted under protest so as to meet the terms of the jeopardy notice, to avoid the payment of penalties and interest, and to enable it an avenue to challenge the manner in which the IRS used the jeopardy provision and jeopardy notice to plaintiff's detriment.

Reply 12.

A. Plaintiff's Alleged First and Second Errors

Plaintiff argues that the court's decision "*contains two clear errors of law when it first incorrectly assumes that a deposit of arbitrage rebate would fail to preserve the tax-exempt status of plaintiff's bonds and when it also incorrectly implies that plaintiff intended to make a payment of rebate to the IRS.*" Mot. 3. According to plaintiff, the court's first clear error of law resulted from its "holding that plaintiff's remittance was not a deposit." *Id.* at 2; see also *id.* at 7 (arguing that the court erred by "assum[ing] that plaintiff was required to make a *payment* of arbitrage rebate in response to the jeopardy notice 'in order to preserve' the tax-exempt status of its bonds"). Plaintiff explains that the

jeopardy provision, which was originally included in temporary arbitrage rebate regulations issued in 1989 and later became part of subsequent arbitrage rebate regulations, "was intentionally written to address certain 'black box' bond issues during the mid-1980's." [4] *Id.* at 3. Specifically, plaintiff asserts, the jeopardy provision was written to address multiple issuances of "'phony issue date' black box transactions," whereby promoters of black box transactions would ensure that their bonds were issued prior to the effective date of the Tax Reform Act of 1986. *Id.* at 5. According to plaintiff, the jeopardy provision was intended "to accelerate the date IRS enforcers could claim a rebate violation . . . ." *Id.* at 6. Plaintiff asserts that "*[w]ith this additional background*, it should be clear to the Court that the jeopardy provision does not mandate a 'payment' of arbitrage rebate." *Id.* (emphasis added). Rather, plaintiff argues that it simply "*deposit[ed]* funds with the U.S. Treasury to fulfill the terms" of the jeopardy notice it received. *Id.* at 7.

According to plaintiff, the court committed a second clear error of law "when it implies that plaintiff intended to make a payment of arbitrage rebate." *Id.* Plaintiff asserts that it believed that it "could remit rebate and file this suit as a means to challenge the constitutionality of the jeopardy provision and the validity of the jeopardy notice." *Id.*; see also *id.* at 8-9 (stating that plaintiff "remitted funds so as to create the opportunity to file this challenge to the jeopardy provision and jeopardy notice, to retrieve its remittance, and to foreclose the possibility that the IRS could raise a new argument due to its lack of remittance"). Thus, plaintiff argues that the court erred by implying that plaintiff "intended to make a *payment*

of rebate in order to preserve the tax-exempt status of its bonds." *Id.* at 9.

Defendant argues that plaintiff already briefed and presented these arguments. Resp. United States Pl.'s Mot. Alter Amend J. ("Resp.") 4-6. It emphasizes that plaintiff's opposition to its motion to dismiss "contended, *inter alia*, that the remittance did not meet the dictionary definition of 'payment'; that it was an installment remittance of an indefinite, estimated amount; and that the IRS treats remittances of arbitrage as though they were deposits." *Id.* at 4 (citing Pl.'s Am. Mem. Opp'n Def.'s Mot. Dismiss Lack Subject Matter Jurisdiction ("Pl.'s Am. Opp'n") 17-18). It then indicates that during briefing, plaintiff "asserted that treatment of arbitrage remittances as deposits is 'fully consistent with *the case law and the particular facts* surrounding Plaintiff's remittance.'" *Id.* (quoting Pl.'s Am. Opp'n 19); see also *id.* at 6 (responding to plaintiff's alleged second error by quoting the same language). Defendant notes that plaintiff also presented this argument related to its first alleged error in its sur-reply to defendant's motion to dismiss. *Id.* at 5; see also *id.* at 6 (indicating that "[p]laintiff simply reiterates these arguments [related to its alleged second error] in its pending motion."); Pl.'s Sur-Reply Def.'s Mot. Dismiss Lack Subject Matter Jurisdiction ("Pl.'s Sur-Reply") 4-10 (arguing that plaintiff's remittance of arbitrage rebate was a deposit).

Additionally, defendant challenges the relevance of plaintiff's "black box" discussion in its motion to amend. Resp. 5. Notwithstanding what it believes is "the total irrelevance of the 'black box' discussion to the interpretation of the regulation, and the complete

absence of any authoritative support for plaintiff's contention," defendant maintains that this argument could have been, but was not, made during earlier briefing. *Id.* Furthermore, defendant asserts that plaintiff's "black box" discussion is not "newly discovered evidence" because

> [t]he supposed "authority" for the "black box" argument is "the background of [plaintiff's] counsel," who worked at [the] IRS in the tax-exempt bond area for "more than 23 years." Thus, even if the "black box" discussion were "evidence" (it is not), it was available to plaintiff at least as early as the initiation of the briefing on defendant's motion to dismiss, and should not be considered now.

Id. (alteration in original & citation omitted).

Plaintiff has not demonstrated that these two alleged errors warrant amendment or alteration of the court's February 27, 2009 decision. First, plaintiff argued thoroughly why its remittance should be characterized as a deposit during briefing on defendant's motion to dismiss. See, e.g., Pl.'s Am. Opp'n 31 ("Plaintiff's remittance should be treated as a deposit regardless of whether such remittance was a remittance of a tax or a remittance of a nontax amount . . . ."); Pl.'s Sur-Reply 6 (contending that the "IRS does not assess arbitrage rebate as a tax"), 8 (suggesting that "deposit treatment of unspecified and disputed installment amounts is . . . consistent with both existing case and administrative law"); Pl.'s Supplemental Mem. 10 ("Plaintiff's installment remittance of an estimated, unspecified amount of arbitrage rebate tax is properly treated as a

refundable deposit of such amount."). The court considered plaintiff's arguments and ultimately declined to characterize plaintiff's payment of arbitrage rebate as a deposit. See *Strategic Hous. Fin. Corp. of Travis County*, 86 Fed. Cl. at 547-49. Consequently, it is clear that plaintiff seeks to relitigate this issue in its motion to amend in order to persuade the court otherwise. This, however, is not the purpose of a motion to amend. See *supra* Part I.

Second, plaintiff never presented its "black box" discussion during prior briefing and withheld doing so until after the court rendered a decision that was adverse to plaintiff. In fact, plaintiff concedes that it raises this "black box" discussion in its motion to amend for the first time. See Mot. 5 (indicating that this discussion constitutes "additional background"). "[A]n argument made for the first time in a motion for reconsideration comes too late, and is ordinarily deemed waived and not preserved for appeal." *Bluebonnet Sav. Bank, F.S.B. v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006); see also *United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court" and that "[i]t is unfair to consider an argument to which the government has been given no opportunity to respond"); *Norman v. United States*, 429 F.3d 1081, 1091 n.5 (Fed. Cir. 2005) (adhering to the rule that arguments raised for the first time in a reply brief are not properly before the court); *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (stating that raising an issue "for the first time in a reply brief does not suffice; reply briefs *reply* to arguments made in the response brief--they do not provide the moving party

with a new opportunity to present yet another issue for the court's consideration"); *Goulding v. United States*, 929 F.2d 329, 333 (7th Cir. 1991) (indicating that arguments presented post-trial and post-decisional briefing are deemed waived because they should have been made "at a much earlier stage in these proceedings"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived" and explaining that "courts are constrained to find, '[a]s a matter of litigation fairness and procedure,' that arguments not addressed in moving briefs have been waived" (quoting *Novosteel SA*, 284 F.3d at 1274 (alteration in original))). Furthermore, plaintiff has not indicated that any evidence that may support its "black box" discussion was unavailable to it at the time the parties engaged in briefing related to defendant's motion to dismiss. [5] In fact, at no point in its motion to amend does plaintiff assert that previously unavailable evidence is now available. Just as a motion for reconsideration should not be based upon evidence that was readily available at the time the motion was heard, *Seldovia Native Ass'n*, 36 Fed. Cl. at 594, so, too, should plaintiff not be permitted in a motion to amend to rely upon readily available evidence that it did not present previously. The court therefore declines to consider this discussion and any evidence in support thereof.

More significantly, even if evidence supporting plaintiff's "black box" discussion was not readily available during earlier proceedings, that evidence is ultimately not relevant. The court's February 27, 2009 decision addressed whether plaintiff, in order to recover an overpayment of arbitrage rebate, was

required to file a refund claim with the IRS pursuant to 26 U.S.C. § 7422(a) before initiating a lawsuit in the Court of Federal Claims. The court determined that arbitrage rebate was encompassed by the "any sum" language contained in 26 U.S.C. § 7422(a), which provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of . . . any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Because plaintiff did not file a refund claim, the court concluded that it lacked subject matter jurisdiction under United States Supreme Court precedent. See *Strategic Hous. Fin. Corp. of Travis County*, 86 Fed. Cl. at 535-46. Neither plaintiff's "black box" discussion nor characterizing plaintiff's remittance of arbitrage rebate as a "deposit" cures this jurisdictional defect, a fact that plaintiff virtually ignores in its motion to amend. [6] As such, plaintiff has not demonstrated that the alleged first and second errors constitute a manifest injustice that requires the court to amend or alter its February 27, 2009 decision.

B. Plaintiff's Alleged Third Error

Plaintiff states that the court committed a "*third clear and grave error of law when it states that 'plaintiff's remittance cannot be withdrawn at any time because doing so would convert its bonds into arbitrage bonds.*'"

Mot. 9. Plaintiff claims that "[a] jeopardy notice is not intended to act as a means to collect rebate . . . ." *Id.* According to plaintiff, the IRS's jeopardy notice subjected it to an acceleration of its remittance of rebate as a result of "an unproven examination theory that it could not refute." *Id.* It admonishes the court for failing to "take evidence on the revenue agent's theory or the validity of the jeopardy notice" and instead "hold[ing] that it was within the sole discretion of the Commissioner to accelerate the payment of rebate." [7] *Id.*; see also *id.* (stating that the court's decision "fails to indicate whether the Commissioner's field agents had the additional authority to demand a variance in the [underlying] facts on which the amount of such remittances are determined"). Furthermore, plaintiff states that "*as previously briefed*, the withdrawal of the remittance does not violate the terms of the jeopardy provision or jeopardy notice." *Id.* at 11 (emphasis added).

Defendant contends that these arguments "simply expand[]" on arguments plaintiff previously asserted. Resp. 7; see also *id.* ("Plaintiff disputes the Court's determination that withdrawing the arbitrage remittance would cause the bonds to become taxable to the bondholders. This issue was addressed in plaintiff's second principal brief on the motion to dismiss."). In fact, plaintiff concedes that it presented similar arguments to the court, noting that it previously briefed whether the withdrawal of the remittance violates the terms of the jeopardy provision. See Mot. 11; see also Pl.'s Sur-Reply 9 (contending that plaintiff was "a bit mystified" by defendant's assertion that "the return of Plaintiff's remittance as an immediately refundable deposit will result in Plaintiff's Bondholders

being taxed on their interest income"), 9-10 (requesting "a return of its deposit," which "will simply put the parties back in the same positions they were in prior to the IRS's mailing of the presumptively-invalid Jeopardy Notice").

Additionally, plaintiff argues in its motion to amend that "*the rebate 'due' in 2006 was zero* and the withdrawal of the entire $ 267,400[.00] over-remittance will not impact the tax-exempt status of the bonds." Mot. 11 (emphasis added). However, plaintiff previously presented a contrary position, indicating that it "remitted an amount in excess of *the amount it computed as being due and owing* as its installment remittance. Even though *Plaintiff was required to remit only 90 percent of the amount computed*, or $ 240,669.60, Plaintiff intentionally remitted 100 percent of this amount, or $ 267,444.00." Pl.'s Am. Opp'n 21 (emphasis added). Plaintiff cannot use its motion to amend to relitigate an issue that it previously addressed, regardless of whether its current arguments could have been raised previously or are inconsistent with its prior position. As such, plaintiff has not demonstrated that the alleged third error constitutes a manifest injustice that requires the court to amend or alter its February 27, 2009 decision.

C. Plaintiff's Alleged Fourth Error

According to plaintiff, the court committed a "*fourth clear error of law when it finds that plaintiff bore the burden of calculating an IRS 'proposed deficiency' or 'proposed amount' in response to the jeopardy notice.*" Mot. 11; Reply 7 (claiming manifest error of fact and law based upon the court's "find[ing] that plaintiff was

required to compute the amount of its actual remittance). But see Reply 6 (stating that the court's "opinion fails to address whether plaintiff bore the responsibility to make both calculations"). Plaintiff states:

> *As pled and previously briefed*, the fact that the IRS's suspect jeopardy notice did not specify a dollar amount owed would normally be an enormous factor in favor of deposit treatment. The Court's opinion finds this fact irrelevant based solely on the conclusion that plaintiff bore the burden of calculating its 2006 rebate liability.

Mot. 11-12 (citation omitted & emphasis added). Additionally, plaintiff notes that it engaged the services of outside experts to perform two separate calculations, see *id.*; Reply 6, and that the second calculation "takes into account an unsupported IRS examination theory," Mot. 12. Plaintiff maintains that it should not have been responsible for calculating the amount of arbitrage profit based upon the factors required by the IRS's jeopardy notice. *Id.* at 13. Furthermore, plaintiff states that the court "should conclude that the failure of the IRS to compute and state a certain amount in the jeopardy notice is a significant factor in favor of treating plaintiff's remittance as a deposit." Reply 7.

As defendant notes, plaintiff's motion to amend effectively concedes that plaintiff previously raised these arguments. Resp. 8. Indeed, plaintiff addressed this issue in its sur-reply: "IRS field agents are not empowered to unilaterally change these rules to increase the amount of arbitrage rebate due from State and local governments." Pl.'s Sur-Reply 17; see also *id.*

at 18 (contending that the IRS field office "demanded an immediate remittance . . . without providing any evidence or support" and arguing that defendant "fails to account for the breadth of the Jeopardy Provision and the actions of the IRS field office in issuing the Jeopardy Notice"). The court considered these arguments and determined, based upon 26 U.S.C. § 148(f), that

> [n]othing in section 148(f) requires that the IRS calculate the amount of arbitrage rebate an issuer owes. Rather, that duty rests with the issuer itself, which is instructed to make the calculations and payments according to the applicable regulations. Thus, it was plaintiff's responsibility, rather than the responsibility of the IRS, to calculate the amount of arbitrage profit.

Strategic Hous. Fin. Corp. of Travis County, 86 Fed. Cl. at 548 (citation omitted). Again, plaintiff's motion to amend merely reasserts arguments that it previously presented to the court, and this basis does not warrant granting such a motion. See supra Part I. Furthermore, as stated previously, even if the court were to find that plaintiff was not required to compute the amount of deficiency in response to the jeopardy notice, this does not remedy the jurisdictional defect presented in this case, *viz.*, that plaintiff did not file a refund claim with the IRS pursuant to 26 U.S.C. § 7422(a) before initiating its lawsuit.

D. Plaintiff's Claim of Manifest Injustice Based Upon the Doctrine of Res Judicata

Plaintiff argues that the court's February 27, 2009 decision is "infect[ed]" by errors and inconsistencies, Reply 10, and that plaintiff is foreclosed, based upon the principles of *res judicata*, from raising the same issues in a subsequent proceeding, *id.* at 11; see also *id.* at 12 ("Because of the res judicata implications of the Court's opinion, the Court's opinion manifests severe injustice to plaintiff."). The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). In order to prevail on a claim of res judicata, the party asserting the bar must prove that: (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979); accord *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000). Here, again, the court did not reach the underlying merits of plaintiff's claim, did not issue a final judgment on the merits, and did not dismiss plaintiff's amended complaint with prejudice. See *Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992) ("A dismissal with prejudice effectively renders an adjudication on the merits. Without jurisdiction, the Claims Court cannot presume to dismiss the complaint with prejudice."); *Strategic Hous. Fin. Corp. of Travis County*, 86 Fed. Cl. at 554 (dismissing plaintiff's amended complaint pursuant to RCFC 12(b)(1) and thus without prejudice); supra note 7. Therefore, plaintiff is not, contrary to its claim, foreclosed from "hav[ing] a realistic opportunity to be

heard on its methodology arguments at the IRS administrative review process." Reply 12. As such, plaintiff will not incur manifest injustice on account of the court's February 27, 2009 RCFC 12(b)(1) dismissal without prejudice of its amended complaint.

III. CONCLUSION

In its motion to amend, plaintiff does not assert that an intervening change in the controlling law occurred or that previously unavailable evidence has become available. Instead, plaintiff argues that the court must amend or alter its February 27, 2009 decision in order to prevent manifest injustice. Although plaintiff claims that the four alleged errors raised in its motion to amend "form the core analysis for the court's opinion that plaintiff's remittance was not a deposit," Reply 10, it does not show how these alleged errors caused injustice that is "'apparent to the point of being almost indisputable.'" *Shirlington Limousine & Transp., Inc.*, 78 Fed. Cl. at 31 (quoting *Pac. Gas & Elec. Co.*, 74 Fed. Cl. at 785). Even if these alleged errors were corrected or rectified, plaintiff still could not invoke the court's jurisdiction because it failed to file a refund claim pursuant to 26 U.S.C. § 7422(a). Accordingly, plaintiff's motion to amend is **DENIED**. No costs.

IT IS SO ORDERED.

/s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

Footnote

1 For a recitation of the underlying facts in this case, see *Strategic Hous. Fin. Corp. of Travis County*, 86 Fed. Cl. at 520-26.

2 Plaintiff characterizes its "Facts as Pled" position as follows: "that the jeopardy notice both accelerated the computation date and, separately, demanded an increase in the amount of the remittance based upon an unproven IRS revenue agent's examination theory." Reply 1-2. Plaintiff characterizes "Defendant's Asserted Position" as follows: "that the jeopardy notice did not demand a remittance of any increased amount but only acted to accelerate the rebate computation date." *Id.* at 2.

3 Plaintiff states that its counsel "has worked in the tax-exempt bond sector for more than 23 years," including an "18+ year stint with the IRS," during which time he worked on the initial jeopardy provision "as part of the team of professionals who authored the 1989 temporary arbitrage rebate regulations." Mot. 3 n.2.

4 Plaintiff proffers the following explanation of a black box transaction:

> [P]roceeds of the bonds . . . would be placed in an escrow account for a period of between three to five years. During this period, the proceeds would be invested at an arbitrage yield. Part of the interest earned . . . would be used to pay interest to bondholders and the remaining portion would be used to build up equity in the escrow. At the end of the escrow term . . ., there would typically be just enough original principal and retained earnings . . . to fully pay all

> remaining principal and interest on the bonds. . . .
>
> The "trick" to a black box transaction was to make it difficult, if not impossible, for any of the escrowed proceeds to be used to actually fund the stated purpose of the bond issue (e.g., the construction of a low-income, multi-family housing project). In this way the bondholders would be assured of the return of their principal plus interest . . . . [T]he bondholders would own the highest quality of bonds because their bonds would be secured by highly-rated investments in the escrow (such as U.S. Treasury securities) and not a potentially risky project (e.g., the multi-family housing project), which had been the stated purpose of the issue.

Mot. 3-4.

5 Indeed, plaintiff's counsel recites activities that occurred over twenty-five years ago in support of plaintiff's position. Counsel was presumably aware of these activities at the time of briefing, particularly given his professional experience. See Mot. 3-6 (discussing "black box" bond issues during the "mid-1980's," the Tax Reform Act of 1986, and temporary arbitrage regulations issued in 1989 and 1992); supra note 3.

6 Instead, plaintiff contends:

> [I]t is clear that these errors, which led to the erroneous dismissal of plaintiff's cause of action, were harmful, not harmless, errors. Plaintiff, for

> instance, would not have otherwise been dismissed under RCFC 12(b)(6). Plaintiff fully refuted each of defendant's arguments in its RCFC 12(b)(6) motion, and, in addition, the exhaustion requirement does not apply to the return of deposits. Therefore, absent the erroneous dismissal under RCFC 12(b)(1), the proceeding would not have been otherwise dismissed.

Reply 10 (citations omitted). The court notes that it denied as moot defendant's motion to dismiss for failure to state a claim upon which relief can be granted, having determined that it lacked subject matter jurisdiction. See *Strategic Hous. Fin. Corp. of Travis* County, 86 Fed. Cl. at 519-20, 553.

7 Plaintiff states: "[T]he Court's opinion does not include a finding with respect to the merits of the IRS revenue agent's position. . . . [A]bsent further findings, the Court's opinion includes a clear and grave error of law when it states that the return of plaintiff's rebate deposit would cause its bonds to be treated as taxable obligations." Mot. 11. Again, the court notes that its February 27, 2009 decision addressed whether it possessed subject matter jurisdiction, which is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)) (emphasis added).

No. 06-741 T
UNITED STATES COURT OF FEDERAL CLAIMS

STRATEGIC HOUSING FINANCE CORPORATION OF TRAVIS COUNTY, Plaintiff,

v.

THE UNITED STATES, Defendant.

February 27, 2009, Filed

COUNSEL: Wm. Mark Scott, Washington, DC, for plaintiff.

Jacob E. Christensen, United States Department of Justice, Washington, DC, for defendant. Mary M. Abate, of counsel.

OPINION AND ORDER

SWEENEY, Judge

Before the court is defendant's motion to dismiss for lack of subject matter jurisdiction, filed pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), and, alternatively, its motion to dismiss for failure to state a claim upon which relief can be granted, filed pursuant to RCFC 12(b)(6), related to plaintiff's claims asserted under the takings clause of the Fifth Amendment to the United States Constitution ("Constitution"). [1] In this action, plaintiff Strategic Housing Finance Corporation of Travis County, an issuer of tax-exempt bonds, seeks recovery of $ 267,440.00 in arbitrage rebate that it remitted to

the Internal Revenue Service ("IRS") in accordance with the Internal Revenue Code ("IRC") and regulations promulgated thereunder. According to plaintiff, it overpaid the amount of arbitrage rebate and is entitled to a refund because the IRS required it to make payment more than four years before any payment was due. The IRS's conduct, plaintiff alleges, constitutes an illegal exaction and an illegal taking of its property. Defendant contends that the court lacks jurisdiction to entertain plaintiff's amended complaint because plaintiff failed to exhaust prescribed administrative remedies before it instituted this action. The court determines that oral argument is unnecessary and, for the reasons discussed below, grants defendant's RCFC 12(b)(1) motion and denies as moot defendant's RCFC 12(b)(6) motion.

I. BACKGROUND

A. Arbitrage Bonds

This case involves the tax-exempt status of certain types of bonds. The IRC provides that interest earned on state and local government bonds is generally excluded from bondholders' gross income. [2] 26 U.S.C. § 103(a) (2006). This interest, therefore, is not taxable to the bondholders. *Id.* As a result, the exclusion set forth in section 103(a) "enables state and local governments to issue, and sell to investors, bonds paying lower interest rates than those of other issuers, and thereby to finance their governmental activities at significantly less cost." Mot. United States Dismiss Compl. Lack Subject Matter Jurisdiction ("Def.'s Mot.") 2. The tax exclusion set forth in section 103(a), however, does not

apply to interest on "arbitrage bonds." 26 U.S.C. § 103(b)(2).

An arbitrage bond, for purposes of section 103 of the IRC,

> means any bond issued as part of an issue of any portion of the proceeds of which are reasonably expected (at the time of the issuance of the bond) to be used directly or indirectly—
>
> (1) to acquire higher yielding investments, or
> (2) to replace funds which were used directly or indirectly to acquire higher yielding investments.
>
> For purposes of this subsection, a bond shall be treated as an arbitrage bond if the issuer intentionally uses any portion of the proceeds of the issue of which such bond is a part in a manner described in paragraph (1) or (2).

Id. § 148(a). In other words, "[a]rbitrage bonds generally are obligations issued to acquire other securities where the rate of return of other securities produces a higher yield than the interest cost on the initial bond issue." S. Rep. No. 91-552, at 219, *reprinted in* 1969 U.S.C.C.A.N. at 2254. An issuer of arbitrage bonds "earns arbitrage profits by investing the proceeds of the sale of tax-exempt bonds in investments that earn a higher yield than the interest (yield) paid by the issuer to the purchasers of its bonds (the bondholders)." Def.'s Mot. 3.

In 1969, the United States Senate recognized that

> [s]ome State and local governments have misused their tax exemption privilege by engaging in arbitrage transactions in which the funds from the tax-exempt issues are employed to purchase higher yielding Federal or other obligations[,] the interest on which is not taxed in their hands. . . . The tax-exempt issue in these cases generally specifies that the interest on the Federal bonds or other obligations will be used to service the State and local securities. An individual who purchases a State or local security under such an arbitrage arrangement has the advantage of a tax-exempt security with the safety of a Federal security. The Federal Government then finds itself in the position of becoming an unintended source of revenue for State and local governments while losing the opportunity to tax the interest income from its own taxable bond issues.

S. Rep. No. 91-552, at 219, *reprinted in* 1969 U.S.C.C.A.N. at 2254. Consequently, Congress, in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, denied tax-exempt status to arbitrage bonds in an attempt to eliminate the incentive for issuers to earn arbitrage at the expense of the United States and to ensure that state and local governments did not earn additional revenue for purposes unrelated to the purpose for which the bonds were issued at the expense of the federal government. *See* S. Rep. No. 91-552, at 219-20, *reprinted in* 1969 U.S.C.C.A.N. at 2254.

Prior to 1980, the IRC did not provide for an issuer of arbitrage bonds to disgorge arbitrage profits. Congress enacted the Omnibus Reconciliation Act of 1980, Pub.

L. No. 96-499, 94 Stat. 2599, which amended the IRC to allow for issuers of tax-exempt mortgage subsidy bonds to maintain the bonds' tax-exempt status by paying arbitrage to the mortgagors. [3] Shortly thereafter, Congress again amended the IRC to allow issuers to elect to pay arbitrage profits to the United States, rather than to the mortgagor. [4] *See* Act of Dec. 24, 1980, Pub. L. No. 96-595, 94 Stat. 3464. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, applied similar arbitrage rebate rules to industrial development bonds, which were eligible for tax-exempt status if the issuers paid arbitrage profits to the United States. [5]

When it enacted the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, "Congress effected major revisions of the [IRC] . . . ." *United States v. Carlton*, 512 U.S. 26, 28, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). Relevant here, the 1986 Act repealed most of the provisions set forth in section 103, repealed section 103A entirely, and added sections 141 through 150. Sections 141 through 150 prescribed tax exemption requirements for state and local bonds. Rules relating to arbitrage were moved to section 148, and Congress "extended the arbitrage restrictions and rebate rules to all tax-exempt bonds . . . ." Def.'s Mot. 3 n.6; *see also* Pl.'s Am. Mem. Opp'n Def.'s Mot. ("Pl.'s Am. Opp'n") 4 (stating that "[i]n 1986, Congress significantly expanded the scope of the previously-existing arbitrage restrictions as one of many means to curb the growth in issuance of tax-exempt bonds"). By enacting the 1986 Act, Congress recognized that

> arbitrage is a device for concealing the true cost of a bond-financed facility from the public, since in lieu of directly requesting additional bond

> authority (which the public might not approve), the issuer uses an indirect Federal Government subsidy (i.e., arbitrage profits) to underwrite a portion of the cost. Also, when allowable non-essential function bond volume is limited as under the bill, arbitrage profits may serve as a device through which projects are financed in excess of the allowable volume.

H.R. Rep. No. 99-426, at 517 (1986), *reprinted in* 1986-3 C.B. 1, 517. Plaintiff estimates that the federal government, as a result of these changes, "collects tens to hundreds of millions in arbitrage rebate yearly from hundreds of governmental issuers." Pl.'s Am. Opp'n 4; Pl.'s Supplemental Mem. ("Pl.'s Supp'l Mem.") 1; *see also* Pl.'s Am. Opp'n 4 n.4 (stating that the government collected approximately $ 258 million, $ 172 million, and $ 66 million in arbitrage rebate in 1999, 2000, and 2001, respectively).

Section 148 of the IRC sets forth detailed rules for rebate of arbitrage and was enacted in order

> to minimize the arbitrage benefits from investing gross proceeds of tax-exempt bonds in higher yielding investments and to remove the arbitrage incentives to issue more bonds, to issue bonds earlier, or to leave bonds outstanding longer than is otherwise reasonably necessary to accomplish the governmental purposes for which the bonds were issued.

Treas. Reg. § 1.148-0(a) (as amended in 2003). Section 148, therefore, "requires that certain earnings on higher yielding investments be rebated to the United States."

Id. Pursuant to section 148(f)(1), "[a] bond which is part of an issue shall be treated as an arbitrage bond if the requirements of paragraphs (2) and (3) are not met with respect to such issue." [6] 26 U.S.C. § 148(f)(1). Paragraph (2), which pertains to rebate to the United States, provides:

> An issue shall be treated as meeting the requirements of this paragraph only if an amount equal to the sum of—
>
> (A) the excess of--
> (i) the amount earned on all nonpurpose investments (other than investments attributable to an excess described in this subparagraph), over
> (ii) the amount which would have been earned if such nonpurpose investments were invested at a rate equal to the yield on the issue, plus
> (B) any income attributable to the excess described in subparagraph (A), is paid to the United States by the issuer in accordance with the requirements of paragraph (3).

Id. § 148(f)(2). Paragraph (3), which governs the due dates for arbitrage rebate, provides, in part:

> Except to the extent provided by the Secretary, the amount which is required to be paid to the United States by the issuer shall be paid in installments which are made at least once every 5 years. Each installment shall be in an amount which ensures that 90 percent of the amount described in paragraph (2) with respect to the issue at the time payment of such installment is

> required will have been paid to the United States. The last installment shall be made no later than 60 days after the day on which the last bond of the issue is redeemed and shall be in an amount sufficient to pay the remaining balance of the amount described in paragraph (2) with respect to such issue.

Id. § 148(f)(3).

The United States generally receives arbitrage rebate "'voluntarily' from State and local governments, but also performs hundreds of bond examinations per year[,] many of which target the arbitrage rebate requirement and result in enforced remittances of arbitrage rebate." Pl.'s Supp'l Mem. 1. Plaintiff's use of the term "voluntary" does not suggests that an issuer has unfettered discretion to remit arbitrage rebate to the United States. [7] Section 148(f) requires issuers of tax-exempt bonds either to rebate arbitrage profits arising from a bond issue or to accept the loss of the bond issue's tax-exempt status. *See* 26 U.S.C. § 148(f); Treas. Reg. § 1.148-0 ("Violation of these provisions causes the bonds in the issue to become arbitrage bonds, the interest on which is not excluable from the gross income of the owners under section 103(a)."). The Secretary, however, has discretion, pursuant to section 148(f)(7), to impose a penalty in lieu of a loss of tax-exempt status. *See* 26 U.S.C. § 148(f)(7); *see also* Treas. Reg. § 1.148-3(h)(1) (as amended in 1997) (providing that the failure to pay the correct rebate amount will not cause the bonds to become arbitrage bonds if the Commissioner of Internal Revenue ("Commissioner") "determines that the failure was not caused by willful

neglect and the issuer promptly pays a penalty to the United States").

Section 148(i) requires that the Secretary "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section." 26 U.S.C. § 148(i); *see also* Treas. Reg. §§ 1.148-0 to 1.148-11 (containing the regulations promulgated by the Secretary). Treasury Regulation 1.148-3(i) governs the recovery of an overpayment of rebate, and an issuer may recover an overpayment for an issue of tax-exempt bonds "by establishing to the satisfaction of the Commissioner that the overpayment occurred." Treas. Reg. § 1.148-3(i)(1); *see also id.* § 1.148-3(i)(2)(i)-(ii) (establishing limitations on recovery of overpayment). Additionally, Treasury Regulation 1.148-10 establishes broad anti-abuse rules and confers upon the Commissioner the authority to take specific actions that ensure that the purposes of section 148 are effectuated. *See* Treas. Reg. § 1.148-10 (as amended in 1997). One such rule authorizes the Commissioner to require an earlier date for payment of rebate:

> If the Commissioner determines than an issue is likely to fail to meet the requirements of [section] 1.148-3 and that a failure to serve a notice of demand for payment on the issuer will jeopardize the assessment or collection of tax on interest paid or to be paid on the issue, the date that the Commissioner serves notice on the issuer is treated as a required computation date for payment of rebate for that issue.

Id. § 1.148-10(f).

On June 24, 2008, the IRS released Revenue Procedure 2008-37, which sets forth a deadline for bond issuers to file an administrative claim to recover overpayments of arbitrage rebate and explains procedures relating to these claims. [8] *See* Rev. Proc. 2008-37, 2008-29 I.R.B. 137. Refund claims for an overpayment amount must be filed by an issuer no later than the date that is two years after the final computation date for the applicable issue of bonds. *See id.* § 3.02. However, "[f]or refund claims arising from an issue of bonds for which the final computation date is on or before June 24, 2008[,] the two year period . . . begins on July 1, 2008." *Id.* § 6.02. Once a refund claim has been filed, the IRS Office of Tax Exempt Bonds, Compliance and Program Management ("TEB") processes the claim and determines whether an overpayment occurred and the amount of the overpayment that an issuer may recover. *Id.* § 3.03(1)-(2). The TEB may deny a refund claim because (1) the correct amount of overpayment is less than the requested overpayment amounts, or (2) no overpayment occurred. *Id.* § 3.03(2)(c). Once the TEB makes a preliminary determination that a refund claim should be denied, the issuer has an opportunity to submit, within a prescribed period of time, additional information to support its claim. *Id.* If the issuer fails to do so within the time limitation or if the TEB disagrees that an overpayment occurred, then the TEB "will issue . . . a formal letter to the issuer stating that the refund claim is denied (a *Refund Claim Denial*), subject only to the issuer's appeal right . . . ." [9] *Id.* An issuer's appeal of the TEB's denial may be initiated pursuant to Revenue Procedure 2006-40, 2006-42 I.R.B. 694. *See* Rev. Proc. 2008-37, § 3.04, 2008-29 I.R.B. 137.

Revenue Procedure 2006-40 sets forth procedures for an issuer of tax-exempt bonds to request an administrative appeal from the TEB's denial for recovery of an asserted overpayment of arbitrage rebate. *See* Rev. Proc. 2006-40, 2006-42 I.R.B. 694. The appeal process is available with respect to

> [a]ny issue raised by TEB in a Proposed Adverse Determination that would cause interest on a bond issue to fail to qualify for the exclusion from gross income under section 103 of the Code or any Arbitrage Rebate Claim Denial that involves a denial by TEB of a claim for recovery of arbitrage rebate payments under section 148 of the [IRC] with respect to a bond issue . . . .

Id. § 3.01. The appeal rights, however, are "not available to an issuer prior to the receipt of either such a Proposed Adverse Determination or an Arbitrage Rebate Claim Denial." *Id.* § 4.02. An appeal must be submitted "in writing to TEB within 30 days of the date of TEB's Proposed Adverse Determination or Arbitrage Rebate Claim Denial." *Id.* § 4.03. Failure to initiate an appeal request within the prescribed time frame and in accordance with IRS procedures results in the Proposed Adverse Determination or Arbitrage Rebate Claim Denial becoming final. *Id.* § 4.06. Once final, the interest on the bonds at issue "will no longer be treated as excludable from gross income under section 103 of the [IRC] and TEB may initiate procedures to impose tax on the bondholders with respect to the interest on the bonds." *Id.* § 6. The procedures set forth in Revenue Procedure 2006-40

took effect on September 27, 2006, *id.* § 9, slightly more than one month before plaintiff filed its complaint.

B. Plaintiff's Bonds and Payment of Arbitrage Rebate

Plaintiff, a public nonprofit housing finance corporation organized pursuant to the laws of Texas, Am. Compl. ¶ 7, was established "for the purpose of providing a means of financing the costs of residential developments that will provide decent, safe, and sanitary housing for persons of low and moderate income," Def.'s Mot. App. B, Ex. 1 at B-3. [10] In September 2004, plaintiff issued bonds with a total face value of $ 35 million in order to finance a "lease-to-own" program operated in conjunction with the Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac. [11] Am. Compl. ¶ 11. This program advances home ownership opportunities for low- and moderate-income residents of Travis County, Texas. *Id.* According to plaintiff, the program provided 150 prospective home buyers, who were previously deemed "'credit impaired' or lacked sufficient credit history to purchase a home on their own," a period of time during which they could establish or reestablish their credit while living in a home of their choice. *Id.*

Plaintiff alleges that its bond issue included "an official statement indicating to the purchasers . . . that interest paid on the Bonds could be excluded from gross income for federal income tax purposes." *Id.* ¶ 10. According to plaintiff, this statement was made based upon "an opinion of special tax counsel . . . to the effect that interest paid on the Bonds would be excludible from gross income under the provisions of section 103 of the

[IRC]." *Id.* Although plaintiff sought the advice of tax counsel, it did not request an advance ruling from the IRS that its bonds would qualify for tax-exempt status before it issued the bonds. Def.'s Mot. App. C ¶ 3. [12] Plaintiff alleges that pursuant to the IRC and IRS regulations, "the first date [it] would have been required to remit arbitrage rebate to the IRS would have been . . . November 30, 2010." Am. Compl. ¶ 16.

After plaintiff issued the bonds, "the IRS initiated an audit to determine plaintiff's compliance with the provisions of the [IRC] that relate to issues of tax-exempt bonds." Def.'s Mot. 5; *see also* Am. Compl. ¶ 17 (alleging that the IRS was "actively examining the Bond transaction for purposes of determining compliance with the provisions of the [IRC]"). On May 31, 2006, the IRS notified plaintiff of potential arbitrage violations with respect to the bonds. *See* Def.'s Mot. App. B, Ex. 2 at B-4 ("Although our current examination of your lease to own home ownership program has primarily focused on structural problems potentially altering the bonds' tax status, we are also developing concerns about various arbitrage issues impacting the bonds."); *see also* Am. Compl. ¶ 18 (alleging that the IRS's May 31, 2006 letter contained "blanket assertions" about the "existence of . . . facts [that] would call into question whether certain payments made with respect to a guarantee of the principal and interest payments on the Bonds should be treated as payments made with respect to a qualified guarantee of the Bonds"). Thereafter, on June 26, 2006, the IRS issued a jeopardy notice to plaintiff. [13] Def.'s Mot. App. B, Ex. 3 at B-6 to B-7. In this notice, the IRS required that plaintiff utilize June 26, 2006, as "the computation date for payment of rebate." *Id.* at B-6;

accord Am. Compl. ¶ 19. The notice informed plaintiff that pursuant to Treasury Regulation 1.148-3(g), its rebate payment was due within sixty days after the computation date to which the payment related. Def.'s Mot. App. B, Ex. 3 at B-6. Since the IRS required that plaintiff utilize June 26, 2006, as the computation date, *see id.*, plaintiff's payment was due on August 25, 2006, Def.'s Mot. 5.

Because the June 26, 2006 notice "did not enumerate a specific dollar amount of arbitrage rebate due[,] . . . plaintiff hired outside experts to compute the amount of rebate owed pursuant to its own interpretation of the Jeopardy Notice and existing legal authority." Am. Compl. ¶ 21. These computations resulted in a calculation of $ 267,444.00. [14] *Id. But see id.* ¶ 22 (alleging that "[w]hen the same experts followed the guidelines provided to plaintiff by their special tax counsel and included the same payments as qualified guarantee payments, the rebate computation for the same period resulted in negative arbitrage in the amount of ($ 229,060.43)"). Plaintiff paid arbitrage rebate to the government on September 21, 2006, [15] Def.'s Mot. 5, and indicated on its enclosed IRS Form 8038-T that its "remittance was specifically made under protest with all rights reserved," Am. Compl. ¶ 3; *see also* Def.'s Mot. App. B, Ex. 4 at B-8 (containing a copy of plaintiff's IRS Form 8038-T with typewritten notations that the arbitrage rebate was "paid under protest" with "all rights reserved").

Plaintiff alleges that "normal jeopardy or termination provisions, generally applicable to other taxpayers, . . . have not been made available" to it. Am. Compl. ¶ 25. It also alleges that "[n]o administrative remedies exist for

issuers, such as plaintiff, to contest the merits of any IRS determination prior to the deadline for making an early remittance of arbitrage rebate." *Id.* ¶ 28; *see also id.* ¶ 29 (alleging that the IRS "has also not issued any administrative remedies that would afford municipal issuers, such as plaintiff, a timely, third-party review of the IRS jeopardy determination after a remittance of a jeopardy rebate amount is made"). As of the date of remittance, plaintiff alleges that the IRS "never progressed beyond the initial stages of its audit" and failed to issue "either a 'preliminary adverse determination letter' or a 'proposed adverse determination letter,' as those terms are used in the IRS examination procedures for municipal bonds." *Id.* ¶ 17. Plaintiff also alleges that the IRS "has not taken any affirmative steps to progress beyond the initial stages of the audit since the remittance was made or the filing of this action." *Id.* Furthermore, according to plaintiff, the IRS never provided "any substantiation, theory[,] or rationale to support its finding of jeopardy with respect to its ability to collect tax from the holders or prior holders of the Bonds." *Id.* ¶ 20.

Plaintiff's amended complaint contains three counts. [16] In count one, plaintiff alleges that the IRS's conduct, which plaintiff contends "result[ed] in a required early remittance of a disputed amount, without any opportunity to refute, challenge or contest key findings prior to the payment thereof, constitutes an illegal exaction by the IRS and an illegal taking of plaintiff's property" without just compensation and a deprivation of property without due process in violation of the Fifth Amendment. [17] *Id.* ¶ 38. In count two, plaintiff alleges that the IRS arbitrarily determined--and failed to document or support a finding--that the failure to serve

the June 26, 2006 notice would jeopardize the assessment or collection of tax on interest paid or to be paid on plaintiff's bonds. *Id.* ¶ 41. In count three, plaintiff alleges that the arbitrage rebate remitted to the IRS constitutes an "immediately refundable deposit as a matter of law." *Id.* ¶ 43. Plaintiff seeks the recovery of $ 267,444.00 in arbitrage rebate that it remitted to the IRS, *see id.* ¶¶ 39(4), 41(2), 43(2), and requests that the court "require the IRS to share bondholder information," *id.* ¶ 41(1).

C. Procedural History

On October 31, 2006, one month after it paid arbitrage rebate to the United States, plaintiff instituted this action in the United States Court of Federal Claims ("Court of Federal Claims"). It did so without first filing a refund claim with the IRS. [18] *See* Def.'s Mot. App. C ¶ 3 (stating that plaintiff "did not submit an administrative request to the [IRS] for recovery of arbitrage rebate it paid with respect to the bonds at issue in this suit"). On June 6, 2007, defendant filed an RCFC 12(b)(6) motion in which it argued that the case was "not appropriate for judicial review because plaintiff failed to exhaust its administrative remedies with the IRS prior to bringing this suit to recover the claimed overpayment of arbitrage rebate."[19] Def.'s RCFC 12(b)(6) Mot. 19. The court scheduled oral argument once briefing on defendant's RCFC 12(b)(6) motion concluded.

Before the court heard argument on defendant's RCFC 12(b)(6) motion, defendant filed a motion to postpone oral argument and to permit supplemental briefing "on a related threshold jurisdiction issue--*i.e.*, that the

complaint in this case is jurisdictionally defective under 26 U.S.C. § 7422(a) because plaintiff failed to file an administrative claim for refund prior to initiating this action." [20] Def.'s Mot. Continue & Permit Supp'l Br'g 1. Over plaintiff's objections, *see* Pl.'s Resp. Def.'s Mot. Continue & Permit Supp'l Br'g 2-3 (arguing, *inter alia*, that defendant should have joined its RCFC 12(b)(1) and 12(b)(6) motions and that defendant's assertions concerning the court's subject matter jurisdiction were "immaterial and irrelevant"), the court granted defendant's motion to postpone oral argument and to permit supplemental briefing, *see* Order, Sept. 21, 2007, at 1 ("While the court is sympathetic to plaintiff's desire to proceed expeditiously, . . . [it] finds that in the interests of judicial efficiency and economy, the parties should address the jurisdictional issue raised by defendant . . . .").

On October 2, 2007, plaintiff filed a motion to amend its complaint pursuant to RCFC 15(a), which the court granted. Thereafter, defendant filed the instant motion, and briefing proceeded forward on the jurisdictional issues raised therein. As the parties were briefing defendant's RCFC 12(b)(1) motion, two decisions that the parties deemed pertinent to the instant case were issued. Although plaintiff filed its opposition to the RCFC 12(b)(1) motion on December 5, 2007, it became aware of a December 4, 2007 Court of Federal Claims decision, *Pennoni v. United States* ("*Pennoni I*"), 79 Fed. Cl. 552 (2007), after it filed its opposition brief. The court granted plaintiff's motion to supplement its opposition brief, and plaintiff subsequently filed an amended brief.

After briefing concluded on defendant's RCFC 12(b)(1)

motion, the United States Supreme Court ("Supreme Court") decided *Clintwood Elkhorn Mining Co. v. United States*, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008). Consequently, the court directed the parties to indicate whether, in light of the Supreme Court's decision in *Clintwood Elkhorn Mining Co.*, supplemental briefing was necessary. Despite the parties' divergent views, [21] the court ordered supplemental briefing. *See* Order, Apr. 18, 2008.

Shortly after supplemental briefing concluded, plaintiff filed a notice informing the court of the release of Revenue Procedure 2008-37, which referenced the Supreme Court's decision in *Clintwood Elkhorn Mining Co.* [22] Plaintiff stated:

> If this court is inclined to grant either of Defendant's motions to dismiss, in whole or in part, based on the IRS's publication of these administrative procedures, Plaintiff respectfully requests this Court hold an oral argument on same so as to provide Plaintiff an opportunity to address statutory and judicial exhaustion questions . . . , and whether a judicial claim requirement should be imposed when there remains an indefinite timeframe for administrative action.

Pl.'s Notice Recent IRS Action 1-2 (citation omitted). The court determined that supplemental briefing, rather than oral argument, was appropriate. Accordingly, it directed the parties to file briefs discussing the impact, if any, of Revenue Procedure 2008-37 upon these proceedings. *See* Order, July 9, 2008. After the parties submitted a second round of

supplemental briefs, defendant's RCFC 12(b)(1) motion was fully briefed. The case is now ripe for decision.

II. LEGAL STANDARDS

A. Jurisdiction

The Court of Federal Claims is a court of limited jurisdiction. *Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (citing *United States v. King*, 395 U.S. 1, 3, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)). The scope of this court's jurisdiction to entertain claims and grant relief depends upon the extent to which the United States has waived its sovereign immunity. *King*, 395 U.S. at 4. In "construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress." *Fid. Constr. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir. 1983). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *King*, 395 U.S. at 4. Unless Congress consents to a cause of action against the United States, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States v. Sherwood*, 312 U.S. 584, 587-88, 61 S. Ct. 767, 85 L. Ed. 1058 (1941).

The Tucker Act confers upon the Court of Federal Claims jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not

sounding in tort." 28 U.S.C. § 1491(a)(1) (2006). Although the Tucker Act waives the sovereign immunity of the United States for claims for money damages, it "itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in part). The separate source of substantive law must constitute a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc). "[I]n order for a claim against the United States founded on statute or regulation to be successful, the provisions relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government." *Cummings v. United States*, 17 Cl. Ct. 475, 479 (1989) (citations omitted), *aff'd*, 904 F.2d 45 (Fed. Cir. 1990); *see also United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) (stating that a "grant of a right of action must be made with specificity").

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has described three types of underlying monetary claims that fall within the Tucker Act's waiver of sovereign immunity: claims (1) alleging the existence of a contract between the plaintiff and the government; (2) "where 'the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum'"; and (3) "where 'money has not been paid but the plaintiff asserts that he is

nevertheless entitled to a payment from the treasury.'" *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-08, 178 Ct. Cl. 599 (Ct. Cl. 1967)). Like tax refund claims, illegal exaction claims, which the United States Court of Claims ("Court of Claims") described as claims "where the Government has the citizen's money in its pocket," *Clapp v. United States*, 117 F. Supp. 576, 580, 127 Ct. Cl. 505 (Ct. Cl. 1954), fall within the second category. [23] *See Ontario Power Generation, Inc.*, 369 F.3d at 1301; *see also Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) ("[T]he Tucker Act provides jurisdiction to recover the sums exacted illegally by [the Government] due to its misinterpretation or misapplication of statutes, regulations, or forms."); *CNG Transmission Mgmt. VEBA v. United States*, 84 Fed. Cl. 327, 328 (2008) ("This court's jurisdiction over plaintiff's tax refund claim is undisputed . . . ."); *Radioshack Corp. v. United States*, 82 Fed. Cl. 155, 158 (2008) ("This Court has jurisdiction to consider tax refund suits under 28 U.S.C. § 1491(a)(1)."). Notwithstanding the Tucker Act, the jurisdiction of the Court of Federal Claims "depends upon the extent to which the United States has waived its sovereign immunity." *Myers v. United States*, 50 Fed. Cl. 674, 682 (2001). "With respect to tax refund suits, the United States has waived its sovereign immunity only as articulated in the [IRC]." *Radioshack Corp.*, 82 Fed. Cl. at 158 (citing Supreme Court precedent in *United States v. Williams*, 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995), *United States v. Dalm*, 494 U.S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990), and *Flora v. United States*, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623, 1960-1 C.B. 660 (1960) ("*Flora*

II"), *aff'g* 357 U.S. 63, 78 S. Ct. 1079, 2 L. Ed. 2d 1165, 1958-2 C.B. 895 (1958) ("*Flora I*")).

"A taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected may bring an action against the Government either in United States district court or in the United States Court of Federal Claims." *Clintwood Elkhorn Mining Co.*, 128 S. Ct. at 1514; *accord* 28 U.S.C. § 1346(a)(1). Section 1346 of title 28 of the United States Code provides, in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected . . . .

28 U.S.C. § 1346(a)(1). In order for the court to assert jurisdiction over such a claim, however, a plaintiff must satisfy the requirements set forth in the IRC, which establishes a "scheme [that] provides that a claim for a refund must be filed with the [IRS] before suit can be brought, and establishes strict timeframes for filing such a claim." *Clintwood Elkhorn Mining Co.*, 128 S. Ct. at 1514. In *Flora II*, the Supreme Court described section 1346 as the "keystone in a carefully articulated and quite complicated structure of tax laws." 362 U.S. at 157.

Section 7422(a) functions as a condition on the waiver of

the federal government's sovereign immunity from tax refund suits. *See Chi. Milwaukee Corp. v. United States*, 40 F.3d 373, 375 (Fed. Cir. 1994). It provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a). By requiring that a plaintiff first file a claim with the IRS that complies with IRS regulations, section 7422(a) creates a jurisdictional prerequisite to filing a refund suit. *Chi. Milwaukee Corp.*, 40 F.3d at 374 (citing *Burlington N., Inc. v. United States*, 684 F.2d 866, 868, 231 Ct. Cl. 222 (Ct. Cl. 1982)). This requirement, the Federal Circuit indicated, "'is designed both to prevent surprise and to give adequate notice to the [IRS] of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination.'" *Computervision Corp. v. United States*, 445 F.3d 1355, 1363 (Fed. Cir. 2006) (quoting *Alexander Proudfoot Co. v. United States*, 454 F.2d 1379, 1383, 197 Ct. Cl. 219 (Ct. Cl. 1972)).

In order to be "duly filed" under section 7422(a), a tax refund claim must comply with the timing requirement

set forth in 26 U.S.C. § 6511(a). Section 6511(a) provides:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a). In *Dalm*, the Supreme Court emphasized that "unless a claim for refund of a tax has been filed within the time limits imposed by [section] 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court." 494 U.S. at 602 (citing *United States v. Kales*, 314 U.S. 186, 193, 62 S. Ct. 214, 86 L. Ed. 132, 1941-2 C.B. 214 (1941)) (citation omitted).

Although the Court of Federal Claims possesses jurisdiction to entertain claims arising under the Just Compensation Clause of the Fifth Amendment, the same cannot be said for the Due Process Clause. *See, e.g., James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998) (stating that it is "well established" that the Court of Federal Claims lacks jurisdiction over Fifth Amendment due process claims because the Due Process Clause is not a money-mandating provision); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (indicating that the Due Process Clause of the Fifth Amendment is an insufficient basis for

jurisdiction because it "do[es] not mandate payment of money by the government"). As explained above, illegal exaction claims are one exception. *See Norman*, 429 F.3d at 1095.

B. Motion to Dismiss--RCFC 12(b)(1)

The court's "general power to adjudicate in specific areas of substantive law . . . is properly raised by a [Rule] 12(b)(1) motion." *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999). When considering an RCFC 12(b)(1) motion, the burden of establishing the court's subject matter jurisdiction resides with the party seeking to invoke it. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). The plaintiff "bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). The court must accept as true the allegations in the plaintiff's complaint and must construe such facts in the light most favorable to the nonmoving party. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Reynolds*, 846 F.2d at 747. If the defendant or the court questions jurisdiction, then the plaintiff cannot rely solely on allegations in the complaint but must bring forth relevant, adequate proof to establish jurisdiction. *See McNutt*, 298 U.S. at 189. In deliberating a motion to dismiss for lack of subject matter jurisdiction, the court may examine relevant evidence in order to decide any factual disputes. *See Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999); *Reynolds*, 846 F.2d at 747. If the

court finds that it lacks subject matter jurisdiction, then it must dismiss the claim. *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); *see also* RCFC 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

III. DISCUSSION

Arbitrage rebate "can be complicated and involve a significant number of disputed variables." Pl.'s Am. Opp'n 31. Adding to the complication is the parties' dispute over what constitutes the central issue that the court must resolve. Plaintiff, which contends that "IRS regulations do not portray the legal nature of arbitrage rebate remittances," Pl.'s Resp. Supplemental Br. United States ("Pl.'s Resp. Def.'s Supp'l Br.") 1, argues that defendant's RCFC 12(b)(1) motion raises "whether arbitrage rebate is a tax remitted by taxpayers and, therefore, subject to existing law governing tax refund procedures, or a nontax amount remitted by non-taxpayers." Pl.'s Am. Opp'n 9-10; *see also id.* at 10 (contending that "the first and principal question to be answered by Defendant's motion is whether Plaintiff is a taxpayer who remitted a tax or a non-taxpayer who remitted a non-tax amount"); Pl.'s Sur-Reply Def.'s Mot. ("Pl.'s Sur-Reply") 4 ("Defining Plaintiff's remittance is important for purposes of determining how it should be treated in this proceeding."). According to plaintiff, its status as either a "taxpayer" or "non-taxpayer" would yield "relatively easy decisions" either way:

> For instance, if Plaintiff remitted a nontax amount, then the overwhelming weight of

> authority supports a finding that the law governing tax refunds ([IRC section] 7422) does not apply to this proceeding. If, on the other hand, Plaintiff remitted a tax amount, then the only question that remains is whether Plaintiff's remittance was a payment or a deposit, which, again, is a question that can be answered based on longstanding precedent.

Pl.'s Am. Opp'n 10. Although it asserts that the court must address the classification of arbitrage rebate as either a "tax" or a "non-tax," plaintiff acknowledges that "[i]n the two instances in which the issue has been addressed in a court of law, neither court was required to directly address and fully analyze whether arbitrage rebate is or is not a tax." *Id.* at 11 (citing *City of Galt v. United States*, 804 F. Supp. 1275 (E.D. Cal. 1992), and *Government Finance Officers Ass'n v. United States*, 680 F. Supp. 1538 (N.D. Ga. 1988)); *accord* Pl.'s Sur-Reply 5 n.5; *see also* Pl.'s 2d Supp'l Br. 3 ("[N]o court has defined arbitrage rebate, including neither the Federal Circuit nor the U.S. Supreme Court.").

Defendant, however, contends that the plain language of 26 U.S.C. § 7422(a) "requires that issuers file an administrative claim with the IRS prior to initiating suit to recover arbitrage rebate" and is central to the court's determination in this case. Def.'s Mot. 9. It asserts:

> [T]he fundamental issue to be decided by this Court . . . is whether Congress did *not* intend for a court to decide the question of a bond issuer's entitlement to recovery of a payment of arbitrage rebate, *in the circumstances of this*

> *case--i.e.*, where plaintiff did not first file a refund claim with the [IRS] or otherwise exhaust its administrative remedies, and where the payment was an interim installment of rebate made pursuant to a discretionary determination by the Secretary, under [section] 148(f)(3), to accelerate the due date of the installment.

Reply United States Supp. Mot. Dismiss Compl. Lack Subject Matter Jurisdiction ("Def.'s Reply") 1-2. Defendant argues that section 7422(a) is broad in scope and therefore encompasses arbitrage rebate. Def.'s Mot. 8-11; Def.'s Reply 3.

A. The Court Need Not Determine Whether Arbitrage Rebate Constitutes a "Tax" or a "Non-Tax"

Plaintiff argues that the court "is in the unique position of having an opportunity to define arbitrage rebate," Pl.'s 2d Supp'l Br. 3, emphasizing the fact that "[t]here are no provisions within Title 26 that would define arbitrage rebate as a tax," Pl.'s Am. Opp'n 10. It contends that a "tax" comprises two components: (1) an enforced contribution; (2) that is used for the support of government. [24] *Id.* at 12 (citing *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931)). Plaintiff contends that arbitrage rebate satisfies this second component. *Id.* ("There is little doubt that receipts from arbitrage rebate meet the second requirement in that the funds collected are used to support the Federal government."). However, it asserts that "whether arbitrage rebate is an 'enforced contribution'[ ] is a more difficult question." *Id.*

Nevertheless, plaintiff makes the argument that arbitrage rebate is both a "tax" and a "non-tax":

> [I]f the definition of 'tax' includes arbitrage rebate remittances that are collected and deposited in the U.S. Treasury by IRS agents employing enforcement measures that compel payment, then Plaintiff's arbitrage rebate remittance was a remittance of a 'tax' exacted pursuant to Title 26. If, however, a tax is limited to only contributions that are treated by the IRS as a tax, then Plaintiff's remittance of arbitrage rebate was not a remittance of a tax. Because no court has been asked to resolve this question after full briefing, Plaintiff briefs this Court on the impact of both answers to this primary.

Pl.'s Am. Opp'n 17 (footnote omitted); *see also id.* at 31 (arguing that plaintiff's remittance should be treated as a "deposit" regardless of the question of whether the remittance was of a "tax" or a "non-tax"). On the one hand, plaintiff asserts that remittance of arbitrage rebate is a "deposit of . . . tax," Pl.'s Am. Opp'n 18, because "[u]nder existing case law, arbitrage rebate is a tax," Pl.'s 2d Supp'l Br. 4; *accord id.* at 7 ("[M]any in the bond community today consider arbitrage rebate to be a tax (in essence, a 100% excise tax) imposed directly on State and local government bond issuers."); *id.* ("[R]ebate is a tax . . . ."); *see also* Pl.'s Am. Opp'n 18 (characterizing plaintiff's remittance of arbitrage rebate as "a deposit of such tax made for the purpose of avoiding significant penalties and interest and other serious[,] negative consequences"). Indeed, plaintiff claims that arbitrage rebate "is a disguised tax" and, consequently, plaintiff may be deemed "a taxpayer as it

remitted a tax to the IRS." Pl.'s Supp'l Mem. 10; *see also* Pl.'s 2d Supp'l Br. 7 (claiming that "changes in IRS enforcement and monitoring have eliminated any distinction between arbitrage rebate and other taxes"). *But see* Def.'s Reply Pl.'s Supp'l Mem. 5 n.3 (asserting that plaintiff's reliance upon IRS procedures for auditing issuers of tax-exempt bonds as support that arbitrage rebate constitutes a tax is erroneous given the voluntary nature of arbitrage rebate payment); *supra* note 25; *infra* note 26. If arbitrage rebate is viewed as a tax, plaintiff asserts, then "there is no doubt that arbitrage rebate would fall within the definition of 'tax . . . penalty . . . sum' as defined by [26 U.S.C.] § 7422." Pl.'s Am. Opp'n 18 (first & second alterations in original); *see also id.* (arguing that because plaintiff's remittance was "a deposit of such tax," section 7422 "is inapplicable to Plaintiff's remittance").

On the other hand, plaintiff also suggests that if defendant is correct and arbitrage rebate is a "non-tax" amount, [25] then plaintiff, as a non-taxpayer, can still bring a claim in the Court of Federal Claims because section 7422 does not apply. *Id.* at 24. It argues: "If, as Defendant asserts, arbitrage rebate is a non-tax amount, Defendant is correct that Plaintiff is not a 'taxpayer.' In this instance, the [IRC's] integrated *tax* refund scheme, which is applicable only to suits by taxpayers, does not apply." Pl.'s Supp'l Mem. 9. Section 7422, plaintiff asserts, does not apply to "non-tax" amounts: "[T]he purpose of [26 U.S.C.] § 7422--to protect tax revenue--is inconsistent with a finding that it applies to refund actions involving nontax remittances." Pl.'s Am. Opp'n 29; *see also id.* at 30 (citing cases purporting to support the proposition that

section 7422 "applies to *taxpayers'* requests for the refund of *taxes* and . . . does *not* apply to actions taken by non-taxpayers").

While defendant notes that plaintiff's contradictory position is intentional, [26] it is plaintiff that accuses defendant of "flip-flopp[ing]" and "changing and dropping arguments throughout this proceeding." Pl.'s 2d Supplemental Reply Br. 3. Yet, for its efforts to argue simultaneously that arbitrage rebate is and is not a "tax," plaintiff's underlying contention ultimately yields the same conclusion: section 7422(a), according to plaintiff, does not apply in this case. *See* Pl.'s Am. Opp'n 31 ("Plaintiff's remittance should be treated as a deposit regardless of whether such remittance was a remittance of a tax or a remittance of a nontax amount subject to [26 U.S.C.] § 7422."). It is therefore apparent that the court need not wade into what plaintiff itself suggests is uncharted territory by prescribing a "tax" or "non-tax" label to arbitrage rebate. *See* Pl.'s Resp. Def.'s Supp'l Br. 2 ("Defendant avers that the Court can resolve this dispute over jurisdiction without defining the exact legal nature of arbitrage rebate. Defendant is correct. The particular remittance made by Plaintiff is a refundable deposit excepted from statutory exhaustion requirements regardless of whether rebate remittances are . . . taxes or nontax amounts."). Instead, the court turns to the language of section 7422.

B. Applicability of Section 7422

It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct.

2051, 64 L. Ed. 2d 766 (1980); *accord Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S. Ct. 2204, 65 L. Ed. 2d 144 (1980) ("[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose."). Terms are construed in accordance with their ordinary or natural meaning. *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); *see also Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979) (stating that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" (citing *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S. Ct. 1180, 43 L. Ed. 2d 469 (1975)). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108. The court, therefore, looks to the language of section 7422 in order to determine whether arbitrage rebate is contemplated therein.

1. The IRC Implicitly Indicates That Section 7422 Is Broad in Scope

Defendant places importance upon the location of section 7422 within the IRC. It states: "Implicit in [section] 7422, by virtue of its location . . . , is that its provisions are to apply to any sum that is alleged to have been excessive or in any manner wrongfully collected *under the Internal Revenue Code*." Def.'s Mot. 15. In essence, defendant asserts that "[s]ince Congress did not provide specific means for the recovery or arbitrage rebate, its decision to place the rebate provisions within the [IRC] is a clear indication that

Congress intended the provisions of [section] 7422--already in place--to apply to any suit for recovery." *Id.*, *accord id.* at 14-15 (stating that when Congress enacted provisions for mortgage subsidy bonds, industrial development bonds, and ultimately all types of bonds to rectify arbitrage violations, it "provided no simultaneous statutory mechanism for the recovery of an alleged overpayment of arbitrage rebate," and instead relied upon section 7422).

Plaintiff questions this assertion, arguing that "Congress has prescribed separate provisions within Title 26 that differentiate between the legal rights of taxpayers and non-taxpayers." Pl.'s Am. Opp'n 25. It emphasizes that neither 26 U.S.C. § 6532(c) [27] nor 26 U.S.C. § 7426 [28] applies to taxpayers, whereas 26 U.S.C. § 6532(a) does. [29] *See id.* Since section 7426(f) explicitly provides that "[t]he provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section," 26 U.S.C. § 7426(f), plaintiff maintains that section 7422 "does not apply to suits by non-taxpayers," Pl.'s Am. Opp'n 25.

Plaintiff's counter argument, however, attempts to lead the court down a path that need not be traveled. [30] Without passing on the "tax" versus "non-tax" argument, the IRC does, in fact, implicitly suggest that section 7422 is applied broadly absent an explicit statutory exception. For example, section 6532(a)(1), which imposes a limitations period on suits by taxpayers for the refund of any "internal revenue tax, penalty, or other sum," specifically references section 7422. 26 U.S.C. § 6532(a)(1). Section 6532(c)(1), however, does not reference section 7422 because it

applies only to suits or proceedings under section 7426, *see id.* § 6532(c)(1), and section 7426 suits are specifically excepted from the administrative claim requirements of section 7422, [31] *see id.* § 7426(f). These provisions suggest that where Congress does not intend for section 7422 to apply to certain actions allowed in the IRC, it has provided the appropriate exclusion. [32] Nevertheless, while the court finds support for defendant's argument in the IRC, it does not find this argument dispositive. [33]

2. The Supreme Court Has Determined That Section 7422(a) Is Broad in Scope

As stated above, unless a claim for refund was "duly filed" with the IRS, section 7422(a) prohibits a suit or proceeding in "*any court*" for the recovery of (1) "*any internal revenue tax* alleged to have been erroneously or illegally assessed or collected," (2) "*any penalty* claimed to have been collected without authority," or (3) "*any sum*" alleged to have been wrongfully collected "in *any manner*." *Id.* § 7422(a) (emphasis added). The term "any," which is defined as "[o]ne, some, every, or all without specification," *American Heritage College Dictionary* 64 (4th ed. 2004), suggests that Congress did not seek to qualify the terms "internal revenue tax," "penalty," "sum," or the "manner" in which a sum has been collected. *See* 26 U.S.C. § 7422(a). In fact, the Supreme Court determined that Congress intended a broad scope for section 7422(a) when it analyzed the provision in *Cluntwood Elkhorn Mining Co.* There, the Supreme Court concluded that with "[f]ive 'any's' in one sentence[,] . . . it begins to seem that Congress meant the statute to have expansive reach." 128 S. Ct. at 1516; *see also* Supplemental Br. United States Supp. Mot.

Dismiss Compl. Lack of Subject-Matter Jurisdiction ("Def.'s Supp'l Br.") 3 (stating that *Clintwood Elkhorn Mining Co.* "makes abundantly clear that Congress intended [section] 7422(a) to have very broad application"). Ultimately, the court is bound by the Supreme Court's interpretation of section 7422(a). [34] *See Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims."). Therefore, Congress intended that section 7422(a) preclude suits or proceedings for the recovery of a broad range of claims.

Plaintiff nevertheless contends that the plain language of section 7422(a) is "of little assistance as the wording of [section] 7422 is broad enough to apply to any debt in dispute . . . ." Pl.'s Am. Opp'n 24 (citing *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1135 (D. Minn. 1999)). [35] The court disagrees. The Supreme Court's determination that section 7422(a) is expansive does not suggest that the scope of this provision is endless. Rather, as the language of section 7422(a) makes clear, the statutory bar to initiating suits or proceedings is implicated only with respect to actions seeking the recovery of the following: any erroneously assessed or collected tax, any penalty collected without authority, or any sum wrongfully collected in any manner. *See* 26 U.S.C. § 7422(a). The question is whether arbitrage rebate is encompassed within one of these discrete, albeit broad, categories.

3. The Broad Scope of the "Any Sum" Clause

Contained in Section 7422(a) Encompasses Arbitrage Rebate

Defendant's primary argument is that arbitrage rebate is encompassed by the clause contained in section 7422 that refers to "a[ny] 'sum alleged to have been excessive or in any manner wrongfully collected.'" Def.'s Mot. 8 (quoting 26 U.S.C. § 7422(a)); *see also* Def.'s Reply Pl.'s Supp'l Mem. 2 (arguing that the "any sum" language contained in section 7422(a) should be given the same effect as similar language contained in other IRC provisions, as well as in 28 U.S.C. § 1346(a)). Specifically, defendant argues that "issuers [must] file an administrative claim with the IRS prior to initiating suit to recover arbitrage rebate" because "arbitrage rebate is described in the all-inclusive phrase, 'any sum alleged to have been excessive or in any manner wrongfully collected.'" [36] Def.'s Mot. 9-10 (quoting 26 U.S.C. § 7422(a)). Based upon this language, defendant notes that its interpretation of "any sum" comports with those words' "ordinary, contemporary meaning." *Id.* at 9 (citing *Perrin*, 444 U.S. at 42). Plaintiff asserts that a broad interpretation of the term "sum" is erroneous, Pl.'s Am. Opp'n 24 (citing *In re Air Transportation Excise Tax Litigation*), and that there are "no provisions within Title 26 that would define arbitrage rebate as a tax," *id.* at 10.

a. Previous Interpretations of Section 7422(a) Support the Conclusion That Arbitrage Rebate Falls Within the Phrase "Any Sum"

In 1872, Congress introduced the phrase "any sum" into the predecessor statute to 26 U.S.C. § 7422(a), *see Flora II*, 362 U.S. at 155 n.16, which provided:

> That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for *any sum* which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the commissioner of internal revenue within two years next after the cause of action accrued and not after . . . .

Act of June 6, 1872, § 44, 17 Stat. 230, 257-58 (emphasis added). Five years later, the Supreme Court, interpreting a different statute that contained the term "sum," acknowledged that "[o]ne of the lexical definitions of the word 'sum,' and the sense in which it is most commonly used, is 'money.'" *United States v. Van Auken*, 96 U.S. 366, 368, 24 L. Ed. 852 (1877). This definition included "'[a] quantity of money or currency; an amount indefinitely, as a sum of money, a small sum, or a large sum.'" *Id.* (quoting *Webster's Dictionary*). The definition of "sum" has not changed since the mid-nineteenth century. *See, e.g., American Heritage College Dictionary*, *supra*, at 1381 (defining "sum" as "[a]n amount of money"); *Black's Law Dictionary* 1449 (7th ed. 1999) (defining "sum" as a "quantity of money"). Defendant therefore asserts that the contemporary definition of the term "any sum" contained in the predecessor statute of section 7422 remains viable today, thereby supporting the contention that section 7422(a) contemplates "the recovery of 'any *money* [other than tax or penalty] alleged to have been excessive or in any manner wrongfully collected.'"

Def.'s Mot. 10 (quoting 26 U.S.C. § 7422(a)) (alteration in original).

Defendant finds support for its contention that the 1870s definition of "sum" "has endured over the years to the present," *id.*, in *Flora II*, which was decided by the Supreme Court approximately fifty years ago, [37] *id.* at 12. The *Flora II* court, in construing 28 U.S.C. § 1346(a)(1), determined that the phrase "any sum" did not, contrary to the petitioner's argument, confer jurisdiction to adjudicate suits for refund of only part of a tax, 362 U.S. at 149. Instead, the Supreme Court explained:

> The sweeping role which petitioner assigns these words is based upon a conjunctive reading of "any internal-revenue tax," "any penalty," and "any sum." But we believe that the statute more readily lends itself to the disjunctive reading which is suggested by the connective "or." That is, *"any sum," instead of being related to "any internal-revenue tax" and "any penalty," may refer to amounts which are neither taxes nor penalties. Under this interpretation, the function of the phrase is to permit suit for recovery of items which might not be designated as either "taxes" or "penalties" by Congress or the courts.* One obvious example of such a "sum" is interest. And it is significant that many old tax statutes described the amount which was to be assessed under certain circumstances as a "sum" to be added to the tax, simply as a "sum," as a "percentum," or as "costs." [38]

Id. (footnote & emphasis added). Thus, the Supreme Court concluded that Congress intended "to cover taxes, penalties, *and sums which might, strictly speaking, be neither taxes nor penalties.*" *Id.* at 155 n.16. Subsequent cases have also concluded that the term "sum" is broadly construed. *See, e.g., Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1410 (9th Cir. 1998) ("Section 7422 contrasts the narrow concept of an 'internal revenue tax' with the broad concept of 'any sum.'"); *Hampton v. United States*, 513 F.2d 1234, 1243, 206 Ct. Cl. 422 (Ct. Cl. 1975) (characterizing the phrase "any sum" in section 7422(a) as "all inclusive"); *J.O. Johnson, Inc. v. United States*, 476 F.2d 1337, 1341, 201 Ct. Cl. 315 (Ct. Cl. 1973) (determining that the "all-inclusive 'any sum' term" included the assessment for accumulated earnings tax); *Alexander Proudfoot Co.*, 454 F.2d at 1380 (acknowledging that section 7422(a) "forbids, in *all-inclusive words*, any suit" that falls within its terms (emphasis added)); *see also United States v. Williams*, 514 U.S. 527, 532, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) (noting that 28 U.S.C. § 1346(a)(1), which also includes the phrase "any sum," contains "broad language").

b. The Concerns Expressed by the District Court in *In re Air Transportation Excise Tax Litigation* Over a Broad Reading of Section 7422 Are Not Implicated Here

Plaintiff, citing the decision in *In re Air Transportation Excise Tax Litigation*, cautions that the court should not embrace a reading of the plain language of section 7422 that is too broad, but its reliance upon the case is misplaced. In that case, the plaintiffs, who purported to represent a class of Federal Express Corporation

("FedEx") customers that shipped packages through FedEx during an eight-month period in 1996 and a two-month period in 1997, [39] alleged that FedEx "represented in its contract documents that its rates included [an] excise tax on the transportation of property by air when, in fact, the excise tax was not in effect. 37 F. Supp. 2d at 1135. According to these plaintiffs, FedEx "wrongfully enjoyed a windfall by continuing to collect from Plaintiffs an amount equal to the expired tax." *Id.* FedEx argued, *inter alia*, that (1) the plaintiffs asserted a tax refund claim, (2) the claim was barred by 26 U.S.C. § 7422 because the plaintiffs never filed a refund claim with the IRS, and (3) FedEx was not a proper defendant to a tax refund suit. *Id.*

Although the district court granted FedEx's Rule 12(c) motion, which it treated as one for summary judgment pursuant to Rule 56, *see id.* at 1134, it rejected FedEx's contention that section 7422 barred the plaintiffs' suit, holding that "Plaintiffs' claims are not preempted by [IRC] section 7422," *id.* at 1138. It noted that "it would be futile for Plaintiffs here to seek a refund from the IRS," *id.* at 1137, for two reasons: (1) FedEx never paid anything to the IRS, *id.* at 1136; *accord id.* at 1137 ("[T]he IRS never received any money from FedEx that it could refund to them . . . ."); and (2) plaintiffs "have no way of knowing how much of their shipping charges constituted an amount equal to the expired tax," *id.* at 1136; *accord id.* at 1137 (stating that "neither the Plaintiffs nor the IRS have any idea what the amount of refund should be (if any)"). Accordingly, the district court limited the application of section 7422 to instances in which a taxpayer subject to an internal revenue tax "seeks to recover a purported and paid 'tax' that was actually 'assessed' or 'collected' on behalf of

the government *and that was actually paid to the government.*" *Id.* at 1137. Payment to the government, therefore, was a necessary element of section 7422.

The district court derived this conclusion from the term "recover" contained in section 7422, which "carries the implicit assumption that the funds are, in fact, 'recoverable'--that is, that the funds are either *already in government coffers* or, at least, are *within the government's easy reach.*" *Id.* (emphasis added). As such, the district court rejected FedEx's contention that the term "any sum" was broad enough to encompass the plaintiffs' action regardless of whether there existed any internal revenue tax for the plaintiffs to recover. *Id.* at 1138. In the circumstances presented before it, section 7422, the district court reasoned, "does not preclude actions where . . . a person who was not subject to an internal revenue tax seeks to recover an amount alleged to have been collected by someone else . . . ." *Id.* In other words, "[t]he [c]ourt simply declines to read section 7422 as requiring a person to go to the IRS to recover an incalculable 'tax' that was never due, assessed[,] or paid." *Id.*

Furthermore, the district court declined to adopt FedEx's proffered broad interpretation of the term "sum" because the result would compel a party to involve the IRS when the government, in fact, had no connection to the amount at issue. It explained that FedEx's reading of section 7422

> would require *anyone who pays an allegedly excessive or wrongful "sum" to anyone else, for any reason, to first seek to recover that sum from the IRS, and then the United States*--even

> though the government would have no knowledge of, interest in, or nexus to the sum alleged to have been excessive or wrongful.

Id. (emphasis added). Requiring that a party first seek recovery from the IRS in the instance where the government had no involvement or knowledge would, the district court concluded, "produce an absurd and unjust result which Congress could not have intended." *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 429, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998)).

The concerns expressed by the district court in *In re Air Transportation Excise Tax Litigation* are not implicated here. In this case, plaintiff paid arbitrage rebate directly to the government rather than to a third-party entity. The amount of arbitrage rebate was readily calculable and was due, as stated in the June 26, 2006 jeopardy notice. Plaintiff seeks a refund from the government, not from a third party. The district court's refusal to entertain broad interpretations of section 7422 was limited to the circumstances presented before it, which are wholly distinguishable from those implicated in this case. No pronouncement in *In re Air Transportation Excise Tax Litigation* supports plaintiff's contention that "sum" should not be read broadly to encompass arbitrage rebate, and the court is not bound by the district court's determination. [40] *See Stelco Holding Co. v. United States*, 44 Fed. Cl. 703, 709 n.11 (1999) (considering "precedents decided by the other federal courts of appeal and the federal district courts as instructive, though not binding").

4. The Court Declines to Embrace the Analysis Contained in *Pennoni I*

Plaintiff next contends that section 7422 "does not begin and end with the words 'tax' and 'sum.'" Pl.'s Am. Opp'n 32. It asserts that section 7422(a) "provides that no suit for a tax refund can be filed 'until a claim for refund or credit has been duly filed with the Secretary, *according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.*'" *Id.* (quoting 26 U.S.C. § 7422(a)). Plaintiff suggests that "where a claim process is not provided for in the statute, [section 7422(a)] imposes some minor obligations on government officials to provide a pre-application regulatory path for claim filing." *Id.*

Plaintiff relies upon *Pennoni I*, wherein the plaintiff alleged that the IRS sent an erroneous refund check and later garnished his wages--and levied his bank account--in order to satisfy a tax deficiency. 79 Fed. Cl. at 552-54. The plaintiff claimed that he was entitled to recover the amounts garnished and levied because the IRS failed to follow proper procedures under the IRC for recouping an erroneous refund. *Id.* at 555. The government moved to dismiss pursuant to RCFC 12(b)(1) because the plaintiff's action was, defendant asserted,

> properly characterized as a civil action for refund under 26 U.S.C. § 7422 and . . . plaintiff's case is barred because he failed to satisfy the criteria for such a refund suit, including the requirement in 26 U.S.C. §§ 7422 and 6511 that he first file a timely and sufficient administrative refund claim . . . .

Id. The court denied the government's motion, *id.* at 553, 562, holding that while the phrases "any sum" and

"other sum" contained in sections 7422(a) and 6532(a), respectively, "might appear broad enough to encompass" plaintiff's illegal exaction claim, those statutes were, in fact, limited to tax refund suits "for the recovery of 'overpayment of any tax,'" *id.* at 557.

The *Pennoni I* court, which reached this determination by relying upon *New York Life Insurance Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), [41] and *Usibelli Coal Mine*, 54 Fed. Cl. 373 (2002), *rev'd & remanded by* Nos. 2006-5068, 2006-5075, 311 Fed. Appx. 350, 2008 U.S. App. LEXIS 15735 (Fed. Cir. June 25, 2008) (unpublished order), [42] focused upon the language of sections 7422(a), 6511(a), and 6532(a), and indicated that the broad terms "any sum" and "other sum" were limited by section 6511(a) to suits for the recovery of "tax payments" and of "overpayment of any tax." 79 Fed. Cl. at 556-57. Defendant, however, asserts that this conclusion was reached "without the benefit of briefing by the parties on the applicability of the 'any sum' language of [section] 7422(a) to the plaintiff's suit, although the issue was discussed at oral argument . . . ." Def.'s Reply 6. According to defendant, the *Pennoni I* court's determination gave "*no* effect to the 'sum' language contained in [section] 7422(a) and [section] 6532(a)," *id.*, and was, in light of the Supreme Court's subsequent decision in *Clintwood Elkhorn Mining Co.*, decided incorrectly, Def.'s Supp'l Br. 6.

The *Pennoni I* court also found support for its determination that jurisdiction attached within Technical Advice Memorandum 2004-46-021, [43] *see* 79 Fed. Cl. at 557, which plaintiff asserts "explains why arbitrage rebate refund requests, when treated as refund requests for nontax remittances, are not subject

to . . . [section] 7422 requirements," Pl.'s Am. Opp'n 30. Technical Advice Memorandum 2004-46-021 considered whether the period of limitations for an issuer of bonds to bring suit to recover an overpayment of arbitrage rebate paid to the IRS was two years--pursuant to 26 U.S.C. § 6532(a)--or six years--pursuant to 28 U.S.C. §§ 2401, 2501. *See* I.R.S. Tech. Adv. Mem. 2004-46-021 (Nov. 12, 2004). Because both the IRS and the issuer "agree[d] that an arbitrage rebate [was] not an internal revenue tax or penalty for purposes of [26 U.S.C.] §§ 7422 and 6532, or 28 U.S.C. §§ 1346(a)(1) and 1491(a)(1)," the requirement to file a claim and the timing of the filing of the claim under sections 6402 and 6511 of the IRC, respectively, were "not applicable." *Id.* The issuer, however, asserted that an arbitrage rebate was "'any sum' under those sections . . . ." *Id.*

Noting that the Supreme Court's discussion of the "catchall phrase" of "any sum" in *Flora II* was "instructive" and analyzing the legislative history of the relevant statutory language, the IRS concluded that "the 'any sum' phrase related to costs incidental to the recovery of an internal revenue tax." I.R.S. Tech. Adv. Mem. 2004-46-021. The IRS concluded that arbitrage rebate fell outside this realm:

> An arbitrage rebate under [26 U.S.C.] § 148 is not incidental to the recovery of an internal revenue tax; the payment of a rebate is an alternative to a payment of tax and stands apart from any tax. The rebate cannot be collected from an issuer using the tax collection procedures provided by the [IRC]. Moreover, we have found nothing in the ancestry of the "any sum" language to indicate that the phrase applies

> to nontax claims. Thus, "any sum" does not encompass an arbitrage rebate.

Id.; *see also id.* (concluding that a "deposit, although not a payment of tax, is not 'any sum' sufficient to come within the purview of [26 U.S.C.] § 7422" (citing *N.Y. Life Ins. Co.*, 118 F.3d at 1558)). This determination, the IRS indicated, was "consistent with the [IRS's] long-standing position regarding claims for refund of overpayment interest . . . ." *Id.*

Both *Pennoni I* and Technical Advice Memorandum 2004-46-021 were issued before the Supreme Court decided *Clintwood Elkhorn Mining Co.* On December 14, 2007, nearly eight months after the Supreme Court's ruling, the IRS issued Technical Advice Memorandum 2007-50-018, which revoked Technical Advice Memorandum 2004-46-021: "Technical Advice Memorandum 200446021 . . . has been reconsidered and is now revoked. We have now concluded that the arbitrage rebate overpayment described in [Technical Advice Memorandum] 200446021 is within the meaning of the 'any sum' language contained in [IRC] § 7422(a)." I.R.S. Tech. Adv. Mem. 2007-50-018 (Dec. 14, 2007). In light of *Clintwood Elkhorn Mining Co.*, the parties in *Pennoni I* re-briefed the jurisdictional issue in their cross-motions for summary judgment. Since *Pennoni I*, which was decided before *Clintwood Elkhorn Mining Co.*, buttressed its analysis, in part, based upon *Usibelli Coal Mine*, which was later reversed, and a technical advice memorandum that has since been revoked, the court declines plaintiff's invitation to adopt the *Pennoni I* court's analysis in order to hold that jurisdiction is properly asserted in this case. [44]

Furthermore, subsequent to the close of briefing in the case *sub judice*, the Honorable Nancy B. Firestone, on February 26, 2009, issued another decision in *Pennoni v. United States*, wherein the court considered the effect of *Clintwood Elkhorn Mining Co.* on the plaintiff's claim. *See Pennoni v. United States* ("*Pennoni II*"), No. 06-861T, 86 Fed. Cl. 351, 2009 U.S. Claims LEXIS 46, 2009 WL 522905 (Fed. Cl. Feb. 27, 2009). The *Pennoni II* court determined that it lacked subject matter jurisdiction to consider the plaintiff's claim because the plaintiff had not satisfied the refund requirements set forth in 26 U.S.C. § 7422(a). 2009 U.S. Claims LEXIS 46, [WL] at *6-9, *13. In light of *Pennoni II*, the decision in *Pennoni I* offers plaintiff no support.

5. The Supreme Court's Decision in *Clintwood Elkhorn Mining Co.* Indicates That "Any Sum" Contemplates "Tax" as Well as "Non-Tax" Amounts

Plaintiff contends that the Supreme Court's decision in *Clintwood Elkhorn Mining Co.* is inapposite because its holding "neither addresses the deposit exception to the claim-filing requirement nor its applicability to remittances of arbitrage rebate." Pl.'s Supp'l Mem. 5. It notes that Chief Justice John G. Roberts, Jr., writing for a unanimous court, "lends a hand to our legal wrangling . . . by referring to a 'scheme' for tax refunds *sixteen* times in his twelve-page opinion." *Id.* As such, plaintiff asserts that *Clintwood Elkhorn Mining Co.*, having characterized the IRC as a "tax refund scheme,"[45] *id.*, supports its contention that this scheme "applies broadly to virtually all remittances of taxes, penalties[,] and 'other sums,' so long as such amounts are *remitted by persons who either 'paid' or were*

'subject to' a tax," *id.* at 8. In other words, plaintiff concludes, the IRC's refund scheme does not contemplate arbitrage rebate refund suits because that scheme applies only to taxpayers, a class to which plaintiff does not belong. *Id.* at 9; *accord id.* (reiterating defendant's position that plaintiff is not a taxpayer); *see also id.* at 10 (noting that the term "taxpayer," as defined by the IRC, "mean[s] someone 'subject to a tax'"[46] (quoting 26 U.S.C. § 7701(a)(14))); Pl.'s 2d Supp'l Br. 13 (arguing that the "tax refund scheme" discussed in *Clintwood Elkhorn Mining Co.* "applies to amounts[] such as taxes, interest[,] and tax penalties[] paid by taxpayers"). Defendant argues that plaintiff is misreading the import of the Supreme Court's holding in order to carve out an interpretation that is inconsistent with prior precedent. *See* Def.'s Reply Pl.'s Supp'l Mem. 2 & n.2.

That *Clintwood Elkhorn Mining Co.* addressed the IRC with respect to a tax refund is undisputed, as evidenced by the manner in which the Supreme Court framed the question presented before it: "whether a *taxpayer suing for a refund of taxes* collected in violation of the Export Clause of the Constitution may proceed under the Tucker Act, when his suit does not meet the time limits for refund actions in the [IRC]." 128 S. Ct. at 1514 (emphasis added). The taxpayers in that case, three coal companies, had, since 1978, paid taxes on coal exports pursuant to 26 U.S.C. §§ 4121(a)(1), 4221(a). *Id.* at 1515. After section 4121(a) was held unconstitutional as applied to coal exports, [47] the coal companies filed administrative claims with the IRS for their 1997, 1998, and 1999 payments "in accordance with the refund scheme" provided by the IRC. *Id.* The companies eventually received from the

IRS a refund of those taxes, with interest. *Id.* The companies, however, did not file administrative claims with the IRS for the taxes they paid in 1994, 1995, and 1996, instead initiating suit in the Court of Federal Claims. *Id.* "Notwithstanding the failure of the companies to file timely administrative refund claims" as required by 26 U.S.C. § 6511, the Court of Federal Claims permitted the companies to pursue their claim under the Export Clause of the Constitution based upon the Tucker Act's conferral of jurisdiction and six-year statute of limitations. [48] *Id.* Finding that the coal companies could pursue their claims under the Export Clause even though they did not timely file administrative refund claims with the IRS, the Federal Circuit affirmed that the Court of Federal Claims possessed jurisdiction, but reversed the trial court's holding related to interest, finding that the government was required to pay interest to the companies pursuant to 28 U.S.C. § 2411. *Id.* at 1516. The Supreme Court reversed the Federal Circuit's jurisdictional ruling. *Id.*

As discussed in Part III.B.1, *supra*, the Supreme Court interpreted the statutory language of 26 U.S.C. § 7422(a) broadly. *See* 128 S. Ct. at 1516. Reading section 7422(a) in conjunction with 26 U.S.C. § 6511, the Supreme Court indicated that the latter provision imposed time limitations for filing administrative refund claims with respect "to *any* tax imposed by [title 26 of the United States Code]" in "an 'unusually emphatic form.'" *Id.* (quoting *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997)). Since the coal companies were seeking a refund of taxes imposed by title 26, the Supreme Court determined that the statutory language of section 6511 "plainly covers the companies' claim . . . ." *Id.*; *accord id.*

("[W]e cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the [IRC's] refund scheme before bringing suit, including the requirement to file a timely administrative claim."). This holding, namely that sections 7422(a) and 6511 "require[] a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government," *id.* at 1520, comported with Supreme Court's previous ruling in *United States v. A.S. Kreider Co.*, 313 U.S. 443, 61 S. Ct. 1007, 85 L. Ed. 1447 (1941), wherein it construed section 1113(a) of the Revenue Act of 1926 as precluding a tax refund action filed outside the time limits set forth therein, regardless of the statutory bar prescribed under the Tucker Act. *See Clintwood Elkhorn Mining Co.*, 128 S. Ct. at 1516-17. Congress, the Supreme Court explained, "left it open to provide less liberally for particular actions which, because of special considerations, required different treatment." *A.S. Kreider Co.*, 313 U.S. at 447. Thus, if courts were to permit suits based solely upon the Tucker Act's statute of limitations without regard to congressional intent to "create[] a shorter statute of limitations for tax claims because 'suits against the United States for the recovery of taxes impeded effective administration of the revenue laws,'" then, the Supreme Court reasoned, "[t]he refund scheme in the current [IRC] would have 'no meaning whatever.'" *Clintwood Elkhorn Mining Co.*, 128 S. Ct. at 1517 (quoting *A.S. Kreider Co.*, 313 U.S. at 448). Taxpayers, it emphasized, could simply circumvent the IRC's limitations provisions by invoking the longer,

more forgiving statute of limitations provided by the Tucker Act. *Id.*

The Supreme Court recognized that "Congress has indeed established a detailed refund scheme that subjects complaining taxpayers to various requirements before they can bring suit. This scheme is designed 'to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue.'" [49] *Id.* at 1518 (quoting *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 51 S. Ct. 376, 75 L. Ed. 1025, 72 Ct. Cl. 734, 1931-1 C.B. 431 (1931)). Declining to address the coal companies' "gamely" argument that the Export Clause created a cause of action against the government that could be brought directly under the Tucker Act, the Supreme Court rejected such a contention outright: "We need not decide this question . . . because it does not matter." *Id.* at 1517. The argument mattered little, the Supreme Court asserted, because if "claims are subject to the [IRC] provisions, those claims are barred *whatever the source of the cause of action*." *Id.* (emphasis added).

This pronouncement by the Supreme Court is clear: if the claim is encompassed by the IRC, then the limitations set forth in section 7422(a) apply. Thus, addressing the coal companies' argument that "even if the refund scheme applies to Export Clause cases generally, it does not 'apply to taxes that are, on their face, unconstitutional,'" the Supreme Court reiterated that section 7422(a), with its broad language, is "the primary statute governing the refund process." *Id.* at 1519. Indeed, the Supreme Court explained--referring to an alternative, fallback argument asserted by the

coal companies--that "[e]ven if we agreed that a facially unconstitutional tax for purposes of the tax refund scheme is 'merely in 'the guise of a tax,'" *id.* (quoting *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962)), the reach of section 7422 nevertheless extends to "'*any claim* alleged to have been excessive or in any manner wrongfully collected,'" *id.* (quoting 26 U.S.C. § 7422(a)). As such, the Supreme Court concluded that even if the coal companies were not illegally or erroneously assessed a tax, their claim would still comfortably fall within the broader "any sum" category such that they would be barred from initiating a suit absent filing an administrative refund claim. *See id.*

Clintwood Elkhorn Mining Co. unequivocally concludes that the jurisdictional bar contained in section 7422(a) applies regardless of the underlying characterization of the claim because it reaches "'*any sum* alleged to have been excessive or in any manner wrongfully collected.'" 128 S. Ct. at 1519-20 (quoting 26 U.S.C. § 7422(a)). The court is bound by this determination. Plaintiff, however, attempts to distinguish *Clintwood Elkhorn Mining Co.* in order to claim that this holding is not applicable to the circumstances presented here. The court turns to these arguments, each of which is addressed below, and finds them unavailing.

6. The Court Declines to Adopt Plaintiff's Interpretations of *Clintwood Elkhorn Mining Co.*

As explained above, *Clintwood Elkhorn Mining Co.* unambiguously sets forth the rule that any claim that is subject to IRC provisions is also subject to the

limitations provisions contained therein, *viz.*, the requirement that an administrative refund claim must be initiated before a party may file suit in any court. Plaintiff advances three positions against the application of this rule. First, since *Clintwood Elkhorn Mining Co.* "repeatedly refers to Clintwood Elkhorn Mining Company as a 'taxpayer,'" Pl.'s Supp'l Mem. 7, plaintiff asserts that the IRC's "integrated tax refund scheme, which is applicable only to suits by taxpayers, does not apply" to it since plaintiff is not a taxpayer and arbitrage rebate is a non-tax amount. *Id.* at 9. Second, plaintiff suggests that a proper reading of *Clintwood Elkhorn Mining Co.* yields the following conclusion: its remittance "is either subject to the entire [IRC refund] scheme or it is not." Pl.'s Resp. Def.'s Supp'l Br. 9. Under this second interpretation, plaintiff claims that if the IRC's "*entire* tax refund scheme applies unless an exception exists for Plaintiff's remittance," Pl.'s Supp'l Mem. 10, then it has established the existence of an exception. [60] The court, however, does not find support for these contentions in *Clintwood Elkhorn Mining Co.* Arbitrage rebate is "subject to the [IRC] provisions," 128 S. Ct. at 1517, by virtue of section 148, which directs the Secretary to prescribe regulations that govern the recovery of overpayment of arbitrage rebate, *see* 26 U.S.C. § 148(i); Treas. Reg. § 1.148-3(i). Therefore, regardless of plaintiff's characterization arguments, section 7422, as stated in *Clintwood Elkhorn Mining Co.*, governs.

Third, plaintiff emphasizes that *Clintwood Elkhorn Mining Co.* presented the Supreme Court "with a *taxpayer* who sought six years of *tax* refunds," three of which were statutorily barred by 26 U.S.C. § 6511(a). Pl.'s Resp. Def.'s Supp'l Br. 4 (emphasis added).

Plaintiff generally asserts that since arbitrage rebate is not a tax, section 7422 cannot apply to its refund claim because the statute of limitations contained in section 6511(a) only applies to tax refund suits. In support of this position, plaintiff cites *Radioshack Corp.*, wherein the Court of Federal Claims explained that compliance with the time limitations set forth in section 6511(a) "'is a condition precedent for filing a refund suit in this Court under section 7422(a).'" Pl.'s Resp. Def.'s Supp'l Br. 7 (quoting 82 Fed. Cl. at 158). The *Radioshack Corp.* court explained that *Clintwood Elkhorn Mining Co.* "reaffirmed this principle," 82 Fed. Cl. at 158, noting further that additional precedent--both binding and persuasive--confirmed the interplay of sections 7422 and 6511, *id.* at 159-60.

The applicability of section 7422, however, is not absolutely dependent upon the applicability of section 6511. Section 6511 imposes a time limitation for filing a "[c]laim for credit or refund of an overpayment of *any tax imposed by this title* . . . ." 26 U.S.C. § 6511(a) (emphasis added). Its phrasing specifically applies to a "tax," which is encompassed by specific language in section 7422: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected . . . ." *Id.* § 7422(a) (emphasis added). In *Clintwood Elkhorn Mining Co.*, the Supreme Court discussed the interplay between these two sections because that case addressed a claim for the refund of a "tax." [51] The same was true in *Radioshack Corp.*, which involved a claim for the credit or refund of an excise tax. There, the Court of Federal Claims relied upon prior Court of Claims precedent that emphasized "the overarching prohibition in section 7422 against

maintaining *any* court action absent compliance with section 6511." 82 Fed. Cl. at 156.

Moreover, the two cases upon which *Radioshack Corp.* relied--*Alexander Proudfoot Co.* and *J.O. Johnson, Inc.*--both involved situations concerning the refund of a type of "tax" and not "any sum." In *Alexander Proudfoot Co.*, the court addressed a refund claim for pre-notice interest paid on deficiencies in accumulated earnings tax, 454 F.2d at 1380, which the court "treated the same as the underlying tax for recovery purposes," *id.* at 1384, based upon Supreme Court precedent and the fact that the interest was "assimilate[d] . . . to the tax itself [by the IRC], so that the taxpayer who pays both . . . can and should proceed to seek to recover both together through one proceeding," *id.* at 1382. Furthermore, the *Alexander Proudfoot Co.* court rejected the plaintiff's contention that the "any sum" language of section 7422 did not apply to suits seeking the refund of interest paid on a deficiency, concluding that "[i]f plaintiff were right that a refund claim is unnecessary, the 'any sum' phrase in [26 U.S.C.] § 7422 would have minimal (perhaps no) coverage . . . ." *Id.* at 1384. The *J.O. Johnson, Inc.* court relied upon *Alexander Proudfoot Co.* in addressing "whether plaintiff's claim for the recovery of sums paid *in satisfaction of an accumulated earnings tax* is barred by plaintiff's failure to file a timely claim for refund." 476 F.2d at 1338 (emphasis added)). Although it acknowledged that "accumulated earnings tax is not the type of tax that is reported on the return," *id.* at 1340-41, the court nonetheless concluded that the tax at issue fell within the tax contemplated by section 6511(a), *see id.* at 1340-42. Thus, these courts determined that sections 7422 and 6511 required timely filing of

administrative refund claims because the underlying refunds involved assessed taxes.

While plaintiff maintains that section 6511 "applies broadly to include claims filed by a 'person who paid the tax' or is otherwise 'subject to' a tax," Pl.'s Supp'l Mem. 6 (quoting *Williams*, 514 U.S. at 532-36), nothing in these cases supports the contention that the administrative refund claim prerequisite set forth in section 7422 only applies in cases in which section 6511 is implicated, *viz.*, claims for the credit or refund of an overpayment of a tax. All of these cases involved refunds for tax, and such refunds fall squarely within the plain language of both sections 7422 and 6511. Section 6511, of course, applies specifically to taxes and does not in any way implicate the broader category of claims to recover "any sum" within the meaning of section 7422. [52] Moreover, none of these cases suggest that the IRC has established more than one "scheme" applicable to "tax" and "non-tax" amounts. *Cf.* Pl.'s Supp'l Mem. 6 ("[T]he [IRC's] integrated tax refund scheme . . . applies broadly to all sorts of remittances made by persons (*i.e.*, taxpayers) who have 'paid' or have been 'subject to' a tax.").

To summarize, the court determines that section 7422 applies to requests for refund of arbitrage rebate and that the Supreme Court's decision in *Clintwood Elkhorn Mining Co.* is directly applicable to the circumstances presented here. Accordingly, plaintiff was required to seek an administrative refund prior to initiating suit in the Court of Federal Claims. In light of this determination, the court need not address defendant's argument that failure to apply section 7422

to arbitrage rebate suits would create impractical results. [53]

C. The Court Rejects Plaintiff's Argument That Arbitrage Rebate Is a "Deposit"

Plaintiff next asserts that arbitrage rebate "should be treated as a deposit regardless of whether such remittance was a remittance of a tax or a remittance of a nontax amount subject to IRC [section] 7422." Pl.'s Am. Opp'n 31. It asserts that its remittance "was the first *installment* remittance of arbitrage rebate," *id.* at 18, argues that statutory exhaustion requirements are not applicable to deposits, Pl.'s Resp. Def.'s Supp'l Br. 3 (citing *Rosenman*, 323 U.S. at 658); *accord* Pl.'s Supp'l Mem. 10 (arguing that an exception to the IRC's "tax refund scheme" applies to refundable deposits), and claims that its remittance "is the classic example of a deposit":

> It was remitted in response to an IRS notice that did not specify an amount. It exceeded the amount estimated by Plaintiff as being "due." It was remitted to avoid penalties and interest (and lawsuits). And, it was remitted under protest. Plaintiff did not, in legal terms, "pay" rebate to the U.S[.] Government.

Pl.'s Resp. Def.'s Supp'l Br. 4. Plaintiff maintains that its deposit argument is supported by and "fully consistent with the case law . . . ." Pl.'s Am. Opp'n 19 (citing *Cohen v. United States*, 995 F.2d 205, 209 (Fed. Cir. 1993)). It notes that: (1) the June 26, 2006 jeopardy notice "did not specify a certain dollar liability," [54] *id.* at 20; (2) the IRS never made an assessment or timely

completed examination of its bond, *id.* at 20-21; and (3) plaintiff "remitted an amount in excess of the amount it computed as being due and owing," *id.* at 21; *see also* Pl.'s Resp. Def.'s Supp'l Br. 3 (contending that plaintiff may recover an overpayment pursuant to Treasury Regulation § 1.148-3(i)). Because it believes that its remittance "conforms to existing case law, statutory law, IRS guidance, and IRS practice," Pl.'s Am. Opp'n 23, plaintiff asserts that the court should consider the remittance a deposit and exercise jurisdiction over its claim, *see id.* at 18-23; Pl.'s Resp. Def.'s Supp'l Br. 2-4.

Defendant, however, argues that "[u]nder plaintiff's deposit theory, the rebate required by Congress under [section] 148(f) would become a mere illusory payment that the Government must refund upon request of the issuer, even if the statute of limitations has expired" on the government's ability to declare the bonds taxable and assess tax against the bondholders. Def.'s Reply 13. It emphasizes that arbitrage rebate "is not assessable," *id.*, and notes that nothing required the IRS to "to perform the 90 percent arbitrage calculation for plaintiff or to tell plaintiff the exact dollar amount that would equal the 90 percent due," *id.* at 14. Furthermore, defendant asserts:

> [T]he most obvious flaw in plaintiff's "deposit" theory is that if plaintiff's rebate payment were accorded deposit treatment and were simply returned to plaintiff on demand, plaintiff's bonds would immediately become taxable arbitrage bonds under [26 U.S.C.] § 148(f) for failure to timely pay the required rebate, and plaintiff's bondholders would be liable for tax on the bond

> interest, retroactively to the date of issuance of the bonds.

Id. at 15.

In *Dang v. Commissioner*, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit")--in the context of a tax case wherein the taxpayers received a refund check from the IRS but did not negotiate the check, were subsequently assessed a tax deficiency for the refund amount plus interest by the IRS, and attempted to satisfy that deficiency by returning the refund check to the IRS--explained the difference between a "payment" and a "deposit":

> A taxpayer who is alleged to have a tax deficiency can either make a "payment" or "deposit." A deposit can be for any amount up to and including the proposed liability. The effect of a deposit is that it stops interest from accruing, may be withdrawn at any time, and preserves a taxpayer's right to petition the [United States] Tax Court. A payment, on the other hand, evinces agreement with the IRS's proposed deficiency and indicates the taxpayer's consent to pay the proposed amount. Generally, the taxpayer identifies the character of the remittance (payment or deposit).

259 F.3d 204, 206 n.2 (4th Cir. 2001). While the *Dang* court addressed the assessment of tax rather than arbitrage rebate, the Fourth Circuit's characterization of a "deposit" is instructive. Indeed, plaintiff's remittance of arbitrage rebate was not a deposit. First, plaintiff did not remit an amount "up to and including"

the statutorily prescribed amount owed. *See* 26 U.S.C. § 148(f)(3) (requiring that each installment of arbitrage rebate "be in an amount which ensures that 90 percent of the amount . . . with respect to the issue at the time payment of such installment is required will have been paid to the United States"); *accord* Pl.'s Am. Opp'n 18 ("Issuers are required to only remit 90 percent of arbitrage earned to the date of any installment computation period."). Rather, plaintiff concedes that it "intentionally remitted 100 percent of this amount," contending that this "over-remittance is the straw that breaks the camel['s] back in favor of deposit treatment." Pl.'s Am. Opp'n 21. Plaintiff's remittance of an amount that exceeded the required ninety percent of its arbitrage profits does not transform its payment into a deposit. Second, the June 26, 2006 jeopardy notice plaintiff received from the IRS required rebate of arbitrage profits within sixty days of the notice in order to retain the tax-exempt status of the bonds, and plaintiff made payment in order to preserve that status rather than to stop any accrual of interest. As defendant notes, "[u]nlike in the tax context, the consequence of an issuer's failure to rebate arbitrage is not the imposition of penalties and interest, but is, rather, the loss of the privileged tax-exempt status of the bonds." Def.'s Mot. 24. Third, plaintiff's remittance cannot be withdrawn at any time because doing so would convert its bonds into arbitrage bonds, which would impose liability upon the bondholders for tax on the bond interest.

Finally, plaintiff's argument that its rebate of arbitrage profits constituted a deposit because the June 26, 2006 jeopardy notice did not specify an amount owed, *see* Pl.'s Am. Opp'n 32 ("The Jeopardy Notice did not

specify the full amount of the 'tax' or 'sum' liability . . . ."), is without merit. Nothing in section 148(f) requires that the IRS calculate the amount of arbitrage rebate an issuer owes. Rather, that duty rests with the issuer itself, which is instructed to make the calculations and payments according to the applicable regulations. *See, e.g.*, Treas. Reg. § 1.148-3(c) (providing for the computation of future value of a payment or receipt); *id.* § 1.148-3(e) (indicating how an issuer may treat computation dates); *id.* § 1.148-3(f) (providing for the amount of required rebate installment payment that, "when added to the future value, as of the computation date, of the previous rebate payments made for the issue, equals at least 90 percent of the rebate amount as of that date"). Thus, it was plaintiff's responsibility, rather than the responsibility of the IRS, to calculate the amount of arbitrage profit. Accordingly, the court declines to characterize plaintiff's payment of arbitrage rebate as a "deposit."

To summarize, plaintiff must, in order to recover an overpayment of arbitrage rebate in the Court of Federal Claims, first file a refund claim with the IRS pursuant to 26 U.S.C. § 7422(a). [55] Since it failed to do so prior to filing suit, plaintiff cannot invoke the jurisdiction of this court over its amended complaint. As a result, defendant's RCFC 12(b)(1) motion is granted.

D. Section 7422(a) Precludes the Court From Exercising Jurisdiction Over Plaintiff's Illegal Exaction Claim

Plaintiff alleges that its early remittance of arbitrage rebate constitutes an illegal exaction by the IRS. Am.

Compl. P 38. Specifically, plaintiff "alleges that Federal officials improperly compelled Plaintiff to remit moneys as arbitrage rebate pursuant to an act of Congress . . . and invalid Federal regulations." Pl.'s Am. Opp'n 3. It further asserts that "[t]here is also little doubt that arbitrage rebate may be treated as an exaction notwithstanding Congress's intent or purpose in imposing rebate requirements," *id.* at 12 n.15, and alleges that the IRS improperly demanded remittance of arbitrage rebate before it was due, *see* Am. Compl. P 33 (alleging that plaintiff was harmed by the IRS's "demand for an early remittance of a disputed amount of arbitrage rebate"); *see also* Pl.'s Sur-Reply 19 (indicating that "[s]tate and local governments typically rebate the greatest amount of arbitrage earnings at the end of the first five-year rebate period").

As noted above, an illegal exaction claim is one "where the Government has the citizen's money in its pocket . . . ." *Clapp*, 117 F. Supp. at 580; *accord Eastport S.S. Corp.*, 372 F.2d 1002, 1007-08, 178 Ct. Cl. 599; *see also Black's Law Dictionary*, *supra*, at 581 (defining an exaction as "[t]he act of *demanding more money than is due*" or "[a] fee, reward, or other compensation *arbitrarily or wrongfully demanded*" (emphasis added)). Here, plaintiff cannot maintain the assertion that the IRS demanded more money than was due because plaintiff acknowledges that it voluntarily remitted an amount that was greater than ninety percent of the amount due. Indeed, it remitted 100 percent. *See supra* note 14. Since plaintiff cannot proceed on a theory that the IRS demanded more money than was due, plaintiff pursues the theory that the IRS wrongfully demanded payment of arbitrage profit by unlawfully accelerating the payment due date.

The Tucker Act permits claims for recovery of monies that the government has required to be paid contrary to law." *Aerolineas Argentinas*, 77 F.3d at 1572. As such, plaintiff alleges that the IRS's regulations are "invalid as a matter of law" and that the IRS abused its discretion by wrongfully demanding an accelerated payment. Am. Compl. PP 35, 37-38. Plaintiff also accuses defendant of "fail[ing] to fulfill the pre-application requirement in [26 U.S.C.] § 7422 to provide regulatory guidance applying such provision to arbitrage rebate refund requests." Pl.'s Am. Opp'n 33.

Returning to the Supreme Court's decision in *Clintwood Elkhorn Mining Co.*, the law is settled that if a claim is encompassed by the IRC, then the limitations set forth in section 7422(a) apply. *See* 128 S. Ct. at 1519. Here, the Secretary, pursuant to 26 U.S.C. § 148(i), promulgated regulations authorizing an issuer to seek recovery of an overpayment for an issue of tax-exempt bonds. *See* Treas. Reg. § 1.148-3(i); *cf.* Pl.'s Am. Opp'n 33 (stating that "the claim process for arbitrage rebate is not expressly required by statutory law or by regulation"). As the Federal Circuit noted, regulations "do not maintain an independent life . . . ." *Aerolineas Argentinas*, 77 F.3d at 1575. Thus, to the extent plaintiff claims that the IRS illegally exacted its arbitrage rebate payment and that it is entitled to its return, *see* Am. Compl. P 38 (alleging that the IRS's requirement that plaintiff provide "early remittance of a disputed amount, without any opportunity to refute, challenge[,] or contest key findings prior to the payment thereof," constitutes an illegal exaction), such a claim implicates the IRC generally and 26 U.S.C. § 7422(a) specifically. *See Rosenberg v. United States*, 72 Fed. Cl. 387, 392 (2006) (determining that while the

Court of Federal Claims possesses jurisdiction over a tax refund claim asserting that a tax was alleged to have been erroneously collected, the court lacked jurisdiction over the plaintiff's illegal exaction claim because she failed to "first file a claim for refund with the IRS" pursuant to section 7422(a)), *aff'd*, 223 Fed. App'x 985 (Fed. Cir.), *cert. denied*, 128 S. Ct. 724, 169 L. Ed. 2d 555 (2007). Section 7422(a), as discussed above, precludes a suit "for the recovery of . . . any sum alleged to have been excessive or *in any manner wrongfully collected*, until a claim for refund or credit has been duly filed . . . ." 26 U.S.C. § 7422(a) (emphasis added). This provision, therefore, applies to plaintiff's claim that the IRS accelerated the due date of and "wrongfully collected" its rebate of arbitrage profits. Since plaintiff's illegal exaction claim falls within the scope of 26 U.S.C. § 7422(a), which applies to the recovery of arbitrage rebate, plaintiff cannot invoke the court's jurisdiction over illegal exaction claims without first satisfying the requirements of section 7422(a).

Furthermore, plaintiff has not demonstrated that any statute or provision caused an exaction. *See Norman*, 429 F.3d at 1095. Plaintiff concedes that "the claim process for arbitrage rebate is not expressly required by statutory law or by regulation," Pl.'s Am. Opp'n 33, and merely asserts that it "held a property right in its trust fund moneys," *id.* at 34. Plaintiff does not dispute that it is ultimately required to rebate arbitrage profits to the government in order to preserve the tax-exempt status of its bonds. *See* Am. Opp'n 7 ("If a State or local governmental issuer fails or refuses to remit arbitrage, the IRS, as demonstrated by this case, compels the issuer to remit arbitrage by threatening to tax bondholders on interest received from their ownership

of the bonds."). Instead, it asserts that the Secretary unlawfully accelerated the due date for plaintiff's remittance. As discussed in Part III.G, *infra*, the Secretary possesses the statutory authority to accelerate the timing of plaintiff's payment of arbitrage rebate. *See* 26 U.S.C. § 148(f)(3); Treas. Reg. § 1.148-10(f). Nothing in section 148(f)(3) or Treasury Regulation § 1.148-10(f) "provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co.*, 205 F.3d at 1373). For these reasons, the court lacks jurisdiction over plaintiff's illegal exaction claim.

E. The Court of Federal Claims Lacks Jurisdiction Over Plaintiff's Due Process Claims

As discussed above, the Court of Federal Claims does not, with the exception of illegal exaction claims, possess jurisdiction over Fifth Amendment due process claims. To the extent that plaintiff asserts separate allegations that its due process rights under the Fifth Amendment have been violated, *see* Am. Compl. ¶¶ 38-39; *cf.* Def.'s Reply 2 (stating that "[p]laintiff has apparently abandoned its 'due process' argument"), the court lacks jurisdiction to entertain these claims.

F. Plaintiff's Fifth Amendment Takings Claim

Plaintiff also alleges a Fifth Amendment takings claim, asserting that the IRS's requirement that plaintiff accelerate its payment of arbitrage rebate "constitutes a separate taking of plaintiff's property for public use without just compensation . . . ." Am. Compl. P 39. The Supreme Court's decision in *Clintwood Elkhorn*

Mining Co. forecloses plaintiff's ability to assert a Fifth Amendment takings claim in this case. As discussed above, the Supreme Court rejected arguments from the coal companies that their cause of action could be maintained under the Export Clause, stating that if a claim is subject to provisions in the IRC, then that claim is "barred whatever the source of the cause of action." 128 S. Ct. at 1517. Given this court's determination that 26 U.S.C. § 7422 encompasses arbitrage rebate, plaintiff's Fifth Amendment claim must be dismissed. Nevertheless, the court addresses other reasons why plaintiff cannot assert a Fifth Amendment taking.

1. Plaintiff Has Not Conceded the Legality of the Government's Action

Tucker Act jurisdiction over Fifth Amendment takings claims is premised upon the requirement that the government action was legitimate. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 126-27, 95 S. Ct. 335, 42 L. Ed. 2d 320 & n.16 (1974); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 898-99 (Fed. Cir. 1986); *see also Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1330 (Fed. Cir. 2006) ("[A] takings claim is separate from a challenge to the lawfulness of the government's conduct . . . ."). A plaintiff "must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993). Here, plaintiff alleges that "[s]ection 1.148-10(f) of the Income Tax Regulations is invalid as a matter of law . . . ." Am. Compl. P 35. *But see* Pl.'s Am. Opp'n 34 (stating that plaintiff "assumes the correctness of Defendant's position on the legality of the Federal

government's actions in issuing the Jeopardy Notice" only for the purposes of its takings claim, "but asserts . . . that the issuance of the notice and consequent *remittance constituted a physical taking*"). Consequently, the court lacks jurisdiction over plaintiff's takings claim to the extent that plaintiff disputes the lawfulness of the IRS's action.

2. Even if Plaintiff Has Conceded the Legality of the Government's Action, It Fails to State a Claim Upon Which Relief Can Be Granted

Assuming, *arguendo*, that plaintiff has, in fact, conceded the validity of the IRS's action, *see* Pl.'s Sur-Reply 4 ("Regardless of the validity of the Jeopardy Notice, the enforced collection of Plaintiff's remittance . . . and IRS threats puts Plaintiff's remittance squarely within the definition of a 'tax.'"); *see also* Pl.'s Am. Opp'n 34 (arguing that "[s]olely for purposes of its *alternative* takings claim, Plaintiff assumes the correctness of Defendant's position on the legality of the Federal government's actions"), defendant maintains that plaintiff cannot establish a property right since "the payment of money as a condition imposed by the Government . . . cannot constitute a taking," Def.'s Reply 2. *But see* Pl.'s Am. Opp'n 34 (arguing that the IRS's June 26, 2006 jeopardy notice "and consequent remittance constituted a physical taking that deprived Plaintiff of property (*i.e.*, its trust fund moneys) without just compensation"). Plaintiff acknowledges that "[t]here is no Constitutional right of the State or local government to issue tax free bonds." Pl.'s Am. Opp'n 4. Thus, plaintiff, like the plaintiff in *Longshore v. United States*, recognizes that it "has no preexisting right," 77 F.3d 440, 443 (Fed. Cir. 1996), to

issue tax-exempt bonds. In *Longshore*, the plaintiff asserted, *inter alia*, a takings claim against the Federal Communications Commission ("FCC"), alleging that it participated in an FCC lottery for cellular radio licenses, paid inflated application fees to the FCC, and ultimately did not succeed in obtaining any licenses. *Id.* at 441-42. The Federal Circuit affirmed the dismissal of the takings claim, *id.* at 445, rejecting the argument that the plaintiff "was 'vested' with the statutory right to participate in the lottery once the lottery system was established . . . ." *Id.* at 443. It explained:

> [T]he Government had possession and control of access to the airwaves. That asset, if one wishes to call it that, did not belong to appellant or any other applicant, and no applicant had rights to use it until the FCC issued a proper license. Obtaining that license required participation in a publicly held lottery, for which an entry fee was charged. Congress set the fee, and the FCC collected it. Nothing in either takings law or tax law lends even remote support to appellant's cause.

Id. at 444.

Defendant suggests that the reasoning of *Longshore* is apposite here, *see* Def.'s Mot. 27-28; *see also* Def.'s Reply 2 ("The holding of *Longshore* is directly on point . . . ." (citations omitted)), and the court agrees. Plaintiff had no right to issue tax-exempt bonds, just as the *Longshore* plaintiff had no right to either participate in the FCC's lottery or obtain the radio licenses it sought. Plaintiff did so, however, pursuant to the IRC, which requires the payment of arbitrage rebate as a

"condition with which an issuer must be willing to comply if it wishes to issue tax-exempt bonds." Def.'s Mot. 28. Plaintiff does not dispute "Congress's intent or purpose in imposing rebate requirements," Pl.'s Am. Opp'n 12 n.15, and recognizes that Congress "expanded the types of bonds subject to arbitrage rebate requirements," *id.* at 4. Notwithstanding plaintiff's claim that payment of arbitrage rebate is compulsory, *see supra* note 8, it is clear that plaintiff could have either fulfilled its statutory obligation to remit arbitrage rebate to the government or elected, in lieu of remitting arbitrage rebate, to lose the tax-exempt status of its bonds. Given this choice available to plaintiff, the government did not effect a taking of plaintiff's property.

Additionally, plaintiff cannot assert a "property right in its trust fund moneys." [56] Pl.'s Am. Opp'n 34. As defendant notes, "[t]he manner in which plaintiff may have held its money prior to payment, *i.e.*, in a separate fund or otherwise, is irrelevant." Def.'s Reply 2. Moreover, it claims, plaintiff "mistakenly conflates decisional law granting relief under the takings clause where the claim is based on the confiscation of interest generated on a separate fund of money owned by the claimant," in which cases courts compensate "the owner of the principal where the interest generated by the principal has been taken." *Id.* at 2-3 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)). The Federal Circuit has determined that a takings claim "does not apply to legislation requiring the payment of money, *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1329 (Fed. Cir. 2001) (en banc), and "[r]equiring money to be spent is not a taking of property," *Atlas*

Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990). Therefore, plaintiff does not have a Fifth Amendment property right related to its payment of arbitrage rebate or any interest that might be generated therefrom.

G. The Court Cannot Review IRS Action Concerning the Acceleration of Plaintiff's Computation and Payment of Arbitrage Rebate Pursuant to the Administrative Procedure Act

Finally, plaintiff alleges that the IRS improperly accelerated its calculation and payment of arbitrage rebate, *see* Am. Compl. ¶¶ 24-33, 38-39, 41, and that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2006), "grants judicial review of all agency actions," Pl.'s Am. Opp'n 35. Defendant notes that plaintiff's "entire complaint is based on plaintiff's contention that the calculation and payment of arbitrage rebate was improperly accelerated." Def.'s Mot. 29; *cf.* Pl.'s Sur-Reply 16 ("In issuing the Jeopardy Notice, . . . Defendant both accelerated the time schedule for the remittance of arbitrage and increased the amount of the arbitrage rebate remittance from zero to $ 267,444.00, the amount calculated with the demanded adjustment."). It asserts that the court lacks jurisdiction to entertain the complaint because the Secretary possesses "unqualified discretion" to accelerate the calculation and payment of plaintiff's arbitrage rebate. Def.'s Mot. 29; *accord* Def.'s Reply 15 ("Congress conferred exclusive discretion on the Secretary to adjust the timing of rebate payments by issuers, and the Court may not substitute its own judgment for that of the Secretary in the exercise of that authority.").

As an initial matter, it is well-settled that the Court of Federal Claims lacks jurisdiction to review an agency's decision under the APA. *See, e.g., Martinez v. United States*, 333 F.3d 1295, 1313 (Fed. Cir. 2003) ("[T]he Court of Federal Claims lacks APA jurisdiction . . . ."); *Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993) ("[T]he Claims Court has no authority to invoke the APA."); *accord Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 n.11 (Fed. Cir. 2005) ("Of course, no APA review is available in the Court of Federal Claims."). Thus, because the court cannot entertain actions based upon the APA, plaintiff cannot seek judicial review of the IRS's action on that basis. Even if plaintiff could invoke the APA, it does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Outside the realm of the APA, the court lacks jurisdiction to review the Secretary's discretionary decision. Defendant maintains that the IRS's action fell within the agency's discretion, noting that Congress "has explicitly granted broad authority to the Secretary to promulgate 'such regulations as may be necessary or appropriate to carry out the purposes" of section 148. Def.'s Mot. 29 (quoting 26 U.S.C. § 148(i)); *see also id.* at 30 (relying upon *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 48 S. Ct. 587, 72 L. Ed. 985, 66 Ct. Cl. 770, 1928-2 C.B. 323, T.D. 4172 (1928), wherein the Supreme Court determined that the Commissioner's decision not to make a special assessment related to excess profits and war profits was not subject to judicial review). [57] It asserts that regulations promulgated by the Secretary pursuant to section 148 "are 'legislative' in character, having the force and effect of law." *Id.* (quoting *Batterton v. Francis*, 432

U.S. 416, 425 n.9, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977)). Moreover, defendant emphasizes that Congress "places no limit on the Secretary's discretion," Def.'s Reply 16, particularly since section 148(f)(3) provides: "*Except to the extent provided by the Secretary*, the amount which is required to be paid to the United States by the issuer shall be paid in installments which are made at least once every 5 years." 26 U.S.C. § 148(f)(3) (emphasis added). Defendant notes that the broad discretion accorded the Secretary in section 148(f)(3) enables the Secretary to "give greater leeway than is provided by the statutory default" or, possibly, to "require an issuer to pay over its arbitrage profits more frequently than once every five years." Def.'s Reply 16.

The discretion accorded to the Secretary in section 148(f)(3) is, in fact, not limited. Whereas section 148(f)(7) expressly limits the Secretary's discretion to allow issuers to pay a penalty in lieu of the loss of tax exemption if specific requirements are satisfied, *see* 26 U.S.C. § 148(f)(7)(A)-(C), similar limits are absent from section 148(f)(3). As the Federal Circuit acknowledged in *Murphy v. United States*, "judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct. Unless such a test or standard is provided, courts must abstain." 993 F.2d 871, 873 (Fed. Cir. 1993) (citation omitted). Congress "may deprive this court of jurisdiction to review a discretionary act when it does so expressly, and within the framework of its constitutionally delegated powers." *Fattore v. United States*, 312 F.2d 797, 802, 160 Ct. Cl. 666 (Ct. Cl. 1963). Here, section 148(f)(3) is unambiguous, and the

provision does not limit the Secretary from accelerating the timing of plaintiff's payment of arbitrage rebate. The court, absent an express limitation, cannot infer that such a limitation exists. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Therefore, the court cannot review the IRS's discretionary action to accelerate plaintiff's calculation and payment of arbitrage rebate.

In short, the court lacks jurisdiction to entertain plaintiff's amended complaint on grounds that the Secretary's action--accelerating plaintiff's payment of arbitrage rebate--is subject to judicial review.

IV. CONCLUSION

For the reasons set forth above, it is hereby ordered:

1. Defendant's Motion to Dismiss, filed pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction, is **GRANTED.** The Clerk of Court is directed to dismiss plaintiff's amended complaint **WITHOUT PREJUDICE** and to enter judgment accordingly.

2. Defendant's Motion to Dismiss, filed pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted, is **DENIED AS MOOT.**

No costs.

/s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

Footnotes

1 Before defendant filed the instant motion, it filed, as discussed in Part I.C, *infra*, an RCFC 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.

2 This exemption "has been provided ever since the Federal income tax was adopted in 1913." S. Rep. No. 91-552, at 218 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2252.

3 The 1980 Act added section 103A to the IRC, which applied only to mortgage subsidy bonds. Subsection (i), "Requirements related to arbitrage," set forth requirements, in addition to those already contained in section 103(c), that must be satisfied in order for these bonds to retain their tax-exempt status. *See* 26 U.S.C. § 103A(i) (Supp. V 1981). For example, paragraph (4)(A)(ii) of section 103A(i) provided that arbitrage "shall be paid or credited to the mortgagors as rapidly as may be practicable."

4 As amended, section 103A(i)(4)(D) provided:

> Subparagraph (A) shall be satisfied with respect to any issue if the issuer elects before issuing the obligations to pay over to the United States--
> (i) not less frequently than once each 5 years after the date of issue, an amount equal to 90 percent of the aggregate amount which would be

> required to be paid or credited [**7] to mortgagors under subparagraph (A) (and not theretofore paid to the United States), and
> (ii) not later than 30 days after the redemption of the last obligation, 100 percent of such aggregate amount not theretofore paid to the United States.

26 U.S.C. § 103A(i)(4)(D)(i)-(ii) (Supp. V 1981).

5 The 1984 Act amended section 103(c) of the IRC to incorporate industrial development bonds as follows:

> (D) Rebate to United States. --An issue shall be treated as meeting the requirements of this subparagraph only if an amount equal to the sum of--
> (i) the excess of—
>
> > (I) the aggregate amount earned on all nonpurpose obligations (other than investments attributable to an excess described in this clause), over
> >
> > (II) the amount which would have been earned if all nonpurpose obligations were invested at a rate equal to the yield on the issue, plus
>
> (ii) any income attributable to the excess described in clause (i), is paid to the United States by the issuer in accordance with the requirements of subparagraph (E).

26 U.S.C. § 103(c)(6)(D) (Supp. III 1982). Subparagraph (E) set forth that the amount required to be paid to the United States "shall be paid in installments which are made at least once every 5 years." [**8] *Id.* § 103(c)(6)(E). Each installment "shall be in an amount which insures that 90 percent of the amount described in subparagraph (D) with respect to the issue at the time payment of such installment is required will have been paid to the United States." *Id.* Subparagraph (E) also required that the "last installment shall be made no later than 30 days after the day on which the last obligation of the issue is redeemed . . . ." *Id.* The Secretary of the United States Department of the Treasury ("Secretary") was directed to prescribe regulations necessary to carry out the purposes of the subsection. *Id.* § 103(c)(7).

6 This treatment does not apply to any qualified veterans' mortgage bonds. 26 U.S.C. § 148(f)(1) (2006).

7 Plaintiff notes that while it voluntarily accepted a condition to remit arbitrage rebate when it issued the bonds, it "had no realistic discretion as to whether to make rebate remittance under the Federal government's 'carrot and stick' approach to tax-exempt bonds" because it "made its remittance pursuant to a particularly heavy and fast-swinging 'stick' of threats from Federal agents." Pl.'s Am. Opp'n 17; *see also id.* at 15 ("State and local governments are under significant 'business compulsion' to remit arbitrage in the amount demanded by the IRS.").

8 Revenue Procedure 2008-37 rendered Revenue Procedure 92-83, 1992-42 I.R.B. 29, obsolete. Rev. Proc.

2008-37, § 4, 2008-29 I.R.B. 137. Section 3 of Revenue Procedure 2008-37

> sets forth terms and procedures for filing claims for recovery of an overpayment of rebate, penalty, or yield reduction with respect to an issue (an *overpayment amount*). In order to receive any recovery of an overpayment amount, an issuer must duly file a claim for recovery of an overpayment amount (a *refund claim*) on the then-applicable form (*form*) and at the then-applicable place of filing . . . . Presently, a refund claim shall be made by completing Form 8038-R . . . .

Id. § 3.01. Revenue Procedure 2008-37 also states that 26 U.S.C. § 7422 applies to claims with respect to overpayments [**17] of rebate. *Id.* § 2.11. As noted in Part I.C., *infra*, the parties briefed what impact, if any, Revenue Procedure 2008-37 had upon these proceedings. Plaintiff asserts that Revenue Procedure 2008-37 is "inconsequential" because it is "based on the assumption that arbitrage rebate is not a tax," which plaintiff disputes. Pl.'s 2d Supplemental Opening Br. ("Pl.'s 2d Supp'l Br.") 3. Although it does not rely upon Revenue Procedure 2008-37, defendant emphasizes that "it is consistent with our arguments already briefed to the Court" and "simply updates the guidance already issued by the IRS . . . ." Def.'s Resp. Pl.'s 2d Supplemental Br. ("Def.'s Resp. Pl.'s 2d Supp'l Br.") 3

9 A "Refund Claim Denial" triggers an issuer's right to appeal. Rev. Proc. 2008-37, § 3.03(2)(c), 2008-29 I.R.B. 137. The issuer cannot appeal a refund claim that the

TEB "reject[s] on the basis of a procedural deficiency or incomplete information . . . ." *Id.* § 3.03(2)(b).

10 Defendant's Appendix B contains a declaration of its counsel, Jacob Christensen, to which five exhibits are attached. *See* Def.'s Mot. App. B, Exs. 1-5.

11 Defendant states that the bonds were issued on October 13, 2004, rather than on September 1, 2004, as alleged in the amended complaint. Def.'s Mot. 5 n.8.

12 Defendant's Appendix C contains a declaration of Clifford Gannet, Director of the Tax Exempt Bonds function of the IRS. *See* Def.'s Mot. App. C.

13 The June 26, 2006 notice indicated that it was sent pursuant to the authority granted in Treasury Regulation 1.148-10(f) and explained the grounds upon which the demand for payment of rebate were based. *See* Def.'s Mot. App. B, Ex. 3 at B-6 to B-7. Plaintiff, however, challenges whether the notice was issued with prior review or concurrence by the IRS Office of Chief Counsel. *See* Am. Compl. ¶ 27.

14 According to plaintiff, it was required to remit only ninety percent, or $ 240,699.60, of the total amount of $ 267,440.00 that was due pursuant [**24] to 26 U.S.C. § 148(f)(3). Pl.'s Am. Opp'n 21. Instead, it "intentionally remitted 100 percent of this amount, $ 267,444.00," *id.*, which was "more than the minimum amount 'owed' pursuant to its calculation," *id.* at 21 n.29.

15 The IRS granted plaintiff's requests for extensions of time. Am. Compl. ¶ 3.

16 As noted in Part I.C, *infra*, the court granted plaintiff's motion to amend its complaint.

17 In support of count one, plaintiff alleges that Treasury Regulation 1.148-10(f) is invalid as a matter of law and that the IRS failed to properly delegate authority for the purpose of determining jeopardy. Am. Compl. ¶¶ 35-36.

18 In its opposition brief, plaintiff indicates that it filed an administrative claim with the IRS "several months ago to start the 6-month period under [26 U.S.C.] § 6532," but asserts that it "has not asked to withdraw this action . . . as there is no guarantee that the Defendant will not, once again, change its position upon such a re-filing." Pl.'s Am. Opp'n 33 n.38; *see also* Def.'s Reply App. A, Ex. 2 (containing plaintiff's December 14, 2007 "re-submission" of its IRS Form 8038-R, which was a copy of its original claim filed "on or about September 28, 2007").

19 In its RCFC 12(b)(6) motion, defendant suggested that because plaintiff did not file a refund claim, the court "may wish to examine its own jurisdiction [**28] over this action." Mot. United States Dismiss Compl. ("Def.'s RCFC 12(b)(6) Mot.") 25 n.18.

20 Defendant explained the reason for its motion to postpone oral argument and to permit supplemental briefing:

> At the time that the briefs on our pending [RCFC 12(b)(6)] motion were filed, coordination among the Justice Department and components of the IRS Chief Counsel's office and the office of

> the Commissioner of IRS with respect to this jurisdictional issue--necessitated in part by the existence of an IRS technical advice memorandum (cited in the parties' briefs) that erroneously concluded that [section] 7422(a) does not apply to a request for the recovery of arbitrage rebate--was still ongoing. That process has now been completed, and we are preparing a supplemental motion and brief that will contend . . . that the Court lacks jurisdiction over the subject matter of the complaint, for failure to comply with the requirements of [section] 7422(a).

Mot. United States Continue Oral Argument Set Sept. 25, 2007, Permit Supplemental Briefing Related Threshold Jurisdictional Issue ("Def.'s Mot. Continue & Permit Supp'l Br'g") 2.

21 Defendant indicated that "briefing regarding the effect of *Clintwood Elkhorn [Mining Co.]* on this case is necessary [**31] . . . ." Status Report United States Pursuant Court's Order Apr. 16, 2008, at 1. Plaintiff, however, did not believe that additional briefing was necessary and indicated that it was "surprised by Defendant's failure to simply concede defeat on [the issue that a single refund scheme exists] after the . . . Supreme Court ruled unanimously in favor of a single refund scheme." Pl.'s Resp. Mot. United States Leave File Unilateral Status Report 1.

22 Revenue Procedure 2008-37, as discussed in Part I.A, *supra*, provides "the terms and procedures for requesting . . . a recovery of overpayments of arbitrage rebate, penalty in lieu of rebate, and yield reduction

paid to the United States under section 148 of the [IRC]." Rev. Proc. 2008-37, 2008 IRB LEXIS 478, 2008-29 I.R.B. 137. Revenue Procedure 2008-37 determined that section 7422 "applies to claims with respect to overpayments of rebate, penalty, and yield reduction because the amount of any such overpayment is covered within the 'any sum' language of [section] 7422." *Id.* It also provided that "the form for making a refund claim for an overpayment amount must be filed by an issuer no later than the date that is two years after the final computation date for the applicable issue of bonds . . . ." *Id.*

23 In *Norman v. United States*, the Federal Circuit explained that an illegal exaction

> involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." The classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the government. An illegal exaction involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. The Court of Federal Claims ordinarily lacks jurisdiction over due process claims under the Tucker Act, but has been held to have jurisdiction over illegal exaction claims "when the exaction is based upon an asserted statutory power."

429 F.3d 1081, 1095 (Fed. Cir. 2005) (citations omitted); *see also Figueroa v. United States*, 66 Fed. Cl. 139, 146 (2005) (defining illegal exaction claims as "those where

the claimant seeks the return of all or part of a sum of money he has been improperly required to pay by the Government in contravention of the Constitution, a statute, or a regulation"), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006), *cert. denied*, 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089 (2007). As the court in *Evans v. United States* observed, illegal exaction claims have several variations, including: (1) "[a] plaintiff may sue for a sum 'improperly exacted or retained' in violation of the Constitution, a statute, or a regulation," 74 Fed. Cl. 554, 565 (2006) (quoting *Testan*, 424 U.S. at 401); or (2) "a plaintiff may pursue an allegation that a 'particular provision of law relied upon grants [him], expressly or by implication, a right to be paid a certain sum' and that he has not been so paid," *id.* (quoting *Eastport S.S. Corp.*, 372 F.2d at 1007). In order to invoke Tucker Act jurisdiction over an illegal exaction claim, "a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

24 Defendant argues that "[a]rbitrage rebate . . . neither is an 'enforced contribution' nor is its purpose to 'provide for the support of government.'" Reply United States Pl.'s Supplemental Br. ("Def.'s Reply Pl.'s Supp'l Mem.") 5 n.3 (quoting Pl.'s Supp'l Mem. 9); *accord id.* at 4 ("[A]rbitrage rebate is not a 'tax' . . . ."). Rather, defendant asserts, a "fundamental characteristic of a tax is that it operates '*in invitum*' and is 'capable of being enforced by action against the will of the taxpayer.'" Def.'s Reply 12 (quoting *New Jersey v.*

Anderson, 203 U.S. 483, 492, 27 S. Ct. 137, 51 L. Ed. 284 (1906) (footnote omitted)). Payment of arbitrage rebate, defendant emphasizes, is "purely voluntary." Def.'s Reply Pl.'s Supp'l Mem. 5 n.3. *But see* Pl.'s 2d Supp'l Br. 5 ("[A]rbitrage rebate remittances are not 'voluntary' because they are mandated by business compulsion."); *supra* note 8; *cf.* Pl.'s 2d Supp'l Br. 5 ("[T]he fact that most State and local governments *voluntarily submit* arbitrage rebate remittances is also not sufficient to overcome the indicia of arbitrage rebate as a tax." (emphasis added)).

25 Defendant notes that "Congress explicitly referred to the amount paid to the United States by issuers of tax-exempt bonds as a 'rebate,' not a 'tax.'" Def.'s Reply Pl.'s Supp'l Mem. 4. First, arbitrage rebate, defendant argues, is not a tax because, "[u]nlike a tax, arbitrage rebate cannot be collected by action against the will of the user." Def.'s Reply 12; *accord id.* at 12-13 (noting that payment of arbitrage rebate constitutes a "deliberate choice to earn arbitrage profits, at the expense of the Government, by investing in proceeds of its bonds in high-yield investments"); *see also* Def.'s Resp. Pl.'s 2d Supp'l Br. 3 (indicating that Revenue Procedure 2008-37 establishes a "separate deadline for filing an administrative refund claim for overpayments of arbitrage rebate," whereas the administrative refund claim filing deadlines set forth in 26 U.S.C. § 6511(a) apply only to taxes). Second, defendant explains that the distinction between "rebate" and "tax" "was undoubtedly intentional, when considered in light of the doctrine of 'intergovernmental tax immunity.'" Def.'s Reply Pl.'s Supp'l Mem. 4 (citing *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988)); *accord id.* ("The general immunity of state or

local governments from federal taxation 'arises from the constitutional structure and a concern for protecting state sovereignty whereas the federal immunity arises from the Supremacy Clause [of the United States Constitution].'" (quoting *Baker*, 485 U.S. at 519 n.11 (1988) (alteration in original))). *But see* Pl.'s 2d Supp'l Br. 6 (noting that the Supreme Court has previously invalidated tax laws found to be unconstitutional).

26 Defendant states:

> While plaintiff's argument that its rebate payment was a "tax" seems internally inconsistent with its argument that it was nonetheless not required to file a refund claim under [26 U.S.C.] § 7422, its purpose is obviously to sidestep the refund claim requirement by asserting that its "tax" payment was really a tax "deposit," and hence excepted from the refund claim rules.

Def.'s Reply Pl.'s Supp'l Mem. 6.

27 Section 6532(c)(1) provides for suits by persons other than taxpayers: "Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action." 26 U.S.C. § 6532(c)(1). Section 6532(c)(2), which governs a request for the return of property described in section 6343(b), is not implicated in this action. *See id.* § 6532(c)(2).

28 Section 7426 governs civil actions by persons other than taxpayers. *See* 26 U.S.C. § 7426. The actions

permitted under this section include: wrongful levy; surplus proceeds; substituted sales proceeds; and substitution of value. *See id.* § 7426(a)(1)-(4).

29 Section 6532(a)(1) provides:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

26 U.S.C. § 6532(a)(1).

30 Indeed, section 7422, entitled "Civil actions for refund," is located within Subchapter B, "Proceedings by Taxpayers and Third Parties," of Chapter 76, "Judicial Proceedings," in the IRC.

31 While plaintiff emphasizes the "tax" versus "non-tax" applicability of section 6532(a)(1) and section 6532(c)(1), respectively, the court notes that if section 7422 applies only to taxpayers, as plaintiff asserts, then Congress would not have needed to specify in section 7426(f) that section 7422 did not, in fact, apply to the four non-taxpayer suits described therein. That Congress provided for this exception lends support to defendant's contention that section 7422 is overarching and that it applies to suits initiated by both taxpayers and non-

taxpayers unless an explicit exception within the IRC provides otherwise.

32 Similarly, defendant notes that "Congress has explicitly exempted other amounts collected under the [IRC] from the [IRC's] administrative provisions where it did not intend for them to apply." Def.'s Mot. 15.

33 Plaintiff, in fact, suggests, as noted in footnote 18, *supra*, that section 6532(a)(1) applies to this action:

> Notwithstanding . . . Plaintiff's filing of a claim several months ago to start the 6-month period under IRC [section] 6532[(a)(1)], which applies a six-month waiting period for claims filed pursuant to IRC [section] 7422, Plaintiff has not asked to withdraw this action and, therefore, avoid costs related to the briefing of this issue, as there is no guarantee that the Defendant will not, once again, change its position upon such a re-filing.

Pl.'s Am. Opp'n 33 n.38.

34 Plaintiff suggests that *Clintwood Elkhorn Mining Co.* "is not 'on all fours' with this proceeding." Pl.'s Supp'l Mem. 5. The court further addresses *Clintwood Elkhorn Mining Co.* in Part III.B.5, *infra*.

35 The court addresses plaintiff's reliance upon *In re Air Transporation Excise Tax Litigation* in Part III.B.3.b, *infra*.

36 Defendant's position suggests that arbitrage is not a "tax," but is instead a "non-tax" item that is nonetheless encompassed by the "any sum" language of section 7422(a). *See* Def.'s Mot. 9-13 (discussing the history of revenue statutes and emphasizing the broad scope of the phrase "any sum"). As discussed above, the court need not decide whether arbitrage rebate is a "tax" for the purpose of resolving the instant motion.

37 In *Flora I*, which was affirmed by *Flora II*, the Supreme Court limited the court's tax refund suit jurisdiction to include only those claims in which the taxpayer fully paid all taxes assessed for the tax year at issue prior to the initiation of the claim. 357 U.S. at 72-73. The *Flora I* court's interpretation of the legislative history of 28 U.S.C. § 1346(a)(1) yielded a conclusion that Congress intended no change to the requirement that full payment must be made before instituting suit. 357 U.S. at 72-73; *accord Flora II*, 362 U.S. at 155 (determining that the language set forth in 28 U.S.C. § 1346(a)(1) "reflects an understanding that full payment of the tax was a prerequisite to suit").

38 The *Flora II* court, by concluding that full payment was required before a party could file a refund claim and affirming *Flora I*, relied upon the phrase "any sum" to reject an argument supporting partial payment:

> A careful reading of this statute discloses the absurd result which would flow from construing the addition of the "any sum" language to affect the full-payment rule, which, under this argument would be based upon the "any tax" phrase in the 1866 statute. That is, since the "any sum" phrase occurs only in the statute of

> limitations portion of the 1872 statute, and not in the claim-for-refund provision, a person would be able to bring a suit for part payment without filing a claim for refund.

Flora II, 362 U.S. at 155 n.16.

39 The court noted that these plaintiffs had not moved for class certification. *See* 37 F. Supp. 2d at 1135 n.2.

40 While it addressed monies collected based upon a federal excise tax, the district court's determination that section 7422 "is limited in its application to instances in which [**74] a *taxpayer* . . . seeks to recover a purported and paid 'tax,'" 37 F. Supp. 2d at 1137, does not suggest that section 7422 is limited only to "taxpayer[s]."

41 The Federal Circuit determined that the monies at issue in *New York Life Insurance Co.* were deposits, rather than payment of taxes. *N.Y. Life Ins. Co.*, 118 F.3d at 1559-60. Relying upon authority that determined that a payment expected to accrue in the future did not constitute a payment of taxes erroneously or illegally assessed or collected such that a plaintiff could file a claim for refund, the Federal Circuit concluded that section 7422(a) did not apply because the underlying action was, in fact, not a suit for the return of a tax payment. *Id.* at 1558. Plaintiff therefore argues that its remittance "should be treated as a deposit" of tax. *See* Pl.'s Am. Opp'n 31; Pl.'s 2d Supp'l Br. 1 (citing *N.Y. Life Insurance Co.*).

42 The Federal Circuit reversed the decision of the Court of Federal Claims, concluding that Usibelli Coal

Mine could not bring a complaint under the Tucker Act in light of the Supreme Court's decision in *Clintwood Elkhorn Mining Co. See* 311 Fed. Appx. 350, 2008 U.S. App. LEXIS 15735, at *3. In an unpublished order, it noted that "[t]he taxpayer in this case is in the same position as the taxpayers in *Clintwood Elkhorn [Mining Co.]*," *id.* at *2, and stated that although "the taxpayer had failed to file timely administrative refund claims in compliance with the IRS, the Court of Federal Claims held that it had jurisdiction over the complaint under the Tucker Act," *id.* at *2-3. Since that determination was "incorrect under *Clintwood Elkhorn [Mining Co.]*," the judgment of the trial court "must be reversed." *Id.* at *3. Thus, *Usibelli [**78] Coal Mine* was completely reversed on the merits, making any reliance upon it inconsequential.

Even if *Usibelli Coal Mine* had not been reversed, it is not relevant to the instant dispute. In that case, the court discussed the language and legislative history of 28 U.S.C. § 2411, the predecessor statute of which, between 1921 and 1928, "incorporated precisely the same language now found" in 26 U.S.C. § 7422. 54 Fed. Cl. at 383 (quoting the predecessor statute, which included the phrase "for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws"). The court noted that in 1928, this statutory language was deleted and replaced by the phrase "for any overpayment in respect of any internal-revenue tax," *id.* (citing the Revenue Act of 1928, 45 Stat. 791, 876-77), although the legislative history "attribute[d] no significance whatsoever to this shift in language," *id.* The court

explained that with the enactment of title 28 of the United States Code into positive law in 1948, the predecessor to section 2411 "once again incorporated essentially the same language as current section 7422(a)," a change that the Congress apparently deemed neither significant nor substantive. *Id.* Since the "oscillation from one version of this language to another[] suggest[ed] no substantive change, but merely a repeated shift in phraseology," *id.* at 384, the court concluded that "sum" and "overpayment" were "either synonymous or, at least, not significantly different," *id.* at 385; *see also id.* (noting that the court "simply cannot attach talismanic significance to the fact that the Congress at one point or another used the word 'overpayment' versus the language currently found in section 7422(a)"). Ultimately, the *Usibelli* court never addressed the import of the term "any sum" contained in section 7422(a).

43 Technical advice memoranda are not binding on the Court of Federal Claims. *See* 26 U.S.C. § 6110(k)(3) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."); *id.* § 6110(b)(1)(A) (defining the term "written determination" to include a "ruling, determination letter, technical advice memorandum, or Chief Counsel advice"); *Kerr-McGee Corp. v. United States*, 77 Fed. Cl. 309, 315 (2007).

44 Other Court of Federal Claims decisions do not set binding precedent for separate and distinct cases pending before the court. *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994).

45 Plaintiff states: "[T]he Supreme Court unanimously believes that Congress enacted a tax refund scheme within the [IRC]." Pl.'s Supp'l Mem. 5.

46 For the purpose of accuracy, section 7701(a)(14) defines a taxpayer as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14).

47 As the trial court noted, the government did not appeal the holding of the United States District Court for the Eastern District of Virginia that the coal tax was unconstitutional as applied to exports, and the IRS subsequently issued a notice of acquiescence of that holding. *Andalex Res., Inc. v. United States*, 54 Fed. Cl. 563, 564 (2002) (citing *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998)), *aff'd in part, rev'd in part sub nom. Clintwood Elkhorn Mining Co. v. United States*, 473 F.3d 1373 (Fed. Cir. 2007), *rev'd*, 128 S. Ct. at 1511.

48 The Export Clause provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

49 By enacting section 7422, Congress modified the tax refund structure that had previously been in existence, *viz.*, the institution of a tax refund suit either against the United States or against the IRS district director "to whom the tax was paid" in the judicial district in which the taxpayer resided. S. Rep. No. 1625 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3676, 3681. The Senate observed that

> [u]nder the present practice of filing returns and making payments of taxes to the 58 district

> directors, suits against collection officers are fairly widely dispersed throughout the judicial districts. . . .
>
> . . . [T]hese suits against district directors, on occasion, have presented problems . . . . For example, taxpayers have sued the current district director although his predecessor was the individual who collected the tax. The predecessor district director may have passed away, or have moved from the judicial district necessitating the bringing of the suit in a different judicial district. Sometimes the running of the statute of limitations bars taxpayers from bringing a second suit . . . . Suits against district directors in some cases have also presented a problem for the [IRS]. Occasionally, taxpayers have thought that their cases would obtain more favorable action if brought in a judicial district other than the one of their residence and have therefore sued the district director where he resided in another juridical district, rather than the United States. The bill prevents this attempt to find a more favorable judicial district . . . .
>
> For the reasons given above[,] the bill adds a provision . . . which provides that suits for refund may be maintained only against the United States and not against an officer or employee of the United States.

1966 U.S.C.C.A.N. 3681-82.

50 Indeed, plaintiff hinges its argument upon the assertion that "[a]n exception does apply[:] Plaintiff's

installment remittance of an estimated, unspecified amount of arbitrage rebate tax is properly treated as a refundable deposit of such amount," thereby not requiring the filing of an administrative refund claim prior to initiating a refund suit in the Court of Federal Claims. Pl.'s Supp'l Mem. 10 (citing *Rosenman v. United States*, 323 U.S. 658, 65 S. Ct. 536, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945); *N.Y. Life Ins. Co.*, 118 F.3d at 1553).

51 Indeed, defendant maintains that "the administrative refund claim filing deadlines set forth in [26 U.S.C.] § 6511(a) of the [IRC] apply only to taxes" and supports this position by noting that Revenue Procedure 2008-37 "establishes a separate deadline for filing an administrative refund claim for overpayments of arbitrage rebate . . . ." Def.'s Resp. Pl.'s 2d Supp'l Br. 3; *see also* I.R.S. Rev. Proc. 2008-37 (setting forth a two-year deadline after the final computation date for the filing of a refund claim for overpayment of arbitrage rebate).

52 Furthermore, section 6511 is not relevant here because the IRS has established the relevant procedure for an issuer to seek recovery of overpayment of arbitrage rebate. *See* Rev. Proc. 2008-37, § 3.02, 2008-29 I.R.B. 137 (establishing a deadline of "no later than the date that is two years after the final computation date for the applicable issue of bonds"). Revenue Procedure 2008-37, together with Revenue Procedure 2006-40, which sets forth procedures for an issuer of tax-exempt bonds to request an administrative appeal from a denial for recovery of overpayment of arbitrage rebate, *see* Rev. Proc. 2006-40, 2006-42 I.R.B. 694, requires that an issuer must file a claim for refund with the Secretary, a

requirement that comports with section 7422 and is consistent with the Supreme Court's determination in *Clintwood Elkhorn Mining Co.*

53 Defendant argues that 28 U.S.C. § 1346(a)(1), which waives the United States' sovereign immunity in federal district court, borrows language from the predecessor statute of section 7422(a). Def.'s Mot. 17. Because section 1346(a)(1) is strictly construed as a waiver of sovereign immunity, defendant maintains that if section 7422(a) did not apply to arbitrage rebate suits, then section 1346(a)(1), too, would not encompass arbitrage rebate actions. *Id.* Consequently, defendant argues, the federal district courts would be stripped of jurisdiction over arbitrage rebate suits under section 1346(a)(1), but not under section 1346(a)(2), the latter of which limits claims not greater than $ 10,000.00. *Id.* at 17-18; *see* 28 U.S.C. § 1346(a)(2) (providing that the district courts, concurrent with the Court of Federal Claims, have original jurisdiction of "[a]ny other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort"). This result, defendant claims, would require issuers to "litigate their claims of greater than $ 10,000 exclusively in the Court of Federal Claims instead of in the district court of their residence. Surely that was not Congress'[s] intention in enacting the rebate provisions." Def.'s Mot. 18.

54 In support of its contention that the June 26, 2006 jeopardy notice "did not specify the full amount of the

'tax' or 'sum liability,'" thereby rendering its payment a deposit, plaintiff states:

> [A]s the *Flora* doctrine requires full payment of all "sums" before filing suit for refund thereof, without deposit treatment, this refund action would be at risk at being . . . dismissed for failure to remit less than the full amount of the unspecified "sum" demanded by the Jeopardy Notice prior to bringing suit. Consequently, deposit analysis, by necessity, must apply to all remittances made under IRC [section] 7422 in order to properly apply the *Flora* doctrine.

Pl.'s Am. Opp'n 32 (footnote omitted). Yet, plaintiff also suggests that there is no reason "why the parties are even briefing this Court on the application of IRC [section] 7422 to amounts that the IRS does not assess as taxes" because *Flora* "discussed the requirement as one to pay the full amount *assessed* as tax" and the government indicates that the IRS "does not 'assess' arbitrage rebate as a tax." *Id.* at 32 n.36.

55 The fact that plaintiff filed a refund claim after it initiated this action, *see supra* note 18, does not cure the jurisdictional defect. Indeed, as defendant notes, the IRS cannot act upon plaintiff's claim because it has already been referred to the United States Department of Justice pursuant to 28 U.S.C. §§ 516, 519. *See* Def.'s Reply 1 n.1

56 Plaintiff asserts that it held monies in trust funds that "were created solely from the proceeds of the Bonds under examination by the IRS. These trust fund moneys were being invested pending use to fund the

purchase of homes for low-income residents." Pl.'s Am. Opp'n 34; *accord* Am. Compl. ¶¶ 11, 23. Plaintiff alleges that it used the monies in these funds to remit its arbitrage rebate to the government. Am. Compl. ¶ 26. It claims that these monies "were not fungible with other funds or amounts owned by Plaintiff" and that it "held a property interest in such funds." Pl.'s Am. Opp'n 35.

57 Plaintiff maintains that the circumstances in *Williamsport Wire Rope Co.* are distinguishable, stating that the Supreme Court confronted a "unique situation," which it then contrasted with "more typical situations involving 'problems requiring a high degree of technical knowledge for their solution . . . .'" Pl.'s Am. Opp'n 36 (quoting *Williamsport Wire Rope Co.*, 277 U.S. at 560). It emphasizes that unlike the Supreme Court in *Williamsport Wire Rope Co.*, which addressed "the situation of a large group of taxpayers," 277 U.S. at 561, the court need only concern itself with "a single 'taxpayer.'" Pl.'s Am. Opp'n 36. Nevertheless, the Supreme Court accorded the IRS's "wide experience in such matters and ready access to the means of information" in determining that the agency enjoyed discretion under the circumstances presented in that case. *Williamsport Wire Rope Co.*, 277 U.S. at 561.

2009-5078

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STRATEGIC HOUSING FINANCE CORPORATION OF TRAVIS COUNTY, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 06-CV-741, Judge Margaret M. Sweeney.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 27,

2010.

Dated: 09/20/2010